LABOUR DISPUTE RESOLUTION IN SOUTHERN AFRICA

A Study of Emerging Trends and Realities in Botswana, Lesotho and Swaziland

BY

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DECLARATION

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DEDICATION

This project is dedicated to the memory of **ABUDI.** You sacrificed so much for us, that we may each achieve the maximum possible in life. Your soul hovers above in constant guidance of the few left from your brood.

Pass on the message to the Old Man that we are still ambling on the long, hard and unchartered road of life. We shall get to the end however, so as to give you, our beloved parents, your well-deserved eternal rest.

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LIST OF ABBREVIATIONS

Association of Arbitrators (Southern Africa)	AArb
Botswana Institute of Arbitrators	BIArb
Centre For Analysis of Alternative Dispute Resolution	CAARDS
European Convention on Human Rights	ECHR
European Court of Human Rights	ECHR
European Court of Justice	ECJ
European Social Charter	ESC
Human Rights Act (1999) UK	HRA
International Association of Labour History Institutions	IALHI
Legal Information Institute	LII
Permanent Court of Arbitration	PCA

SADC INSTITUTIONS/DOCUMENTATION

Employment and Labour Sector	ELS
Policies, Priorities and Strategies	ELS 2001
Protocol on Tribunal and Rules of Procedure	PTRC
Social Charter of Fundamental Rights in the SADC	SCFR

SUMMARY

This study is about labour dispute resolution in Botswana, Lesotho and Swaziland. The study involves an extensive examination of the political philosophy, methods, structures and rules of engagement comprehensively described as 'emerging' trends. It concerns labour relations in developing African countries and is necessarily located along the continuum of the socio-legal and historical context of each country.

The study asserts that there is an indisputable connection between the past colonial state and the post-colonial state. It contends that the post-colonial elite openly assimilated the regulatory legal framework of the colonial master and consolidated this framework soon after independence. The study therefore examines the mode of buttressing the *status quo* and the sustenance of command and control inherent in labour legislation. This tendency was rationalised by a misguided fear that those advocating for reforms, particularly those with economic power exerting a diluting influence on the dominant position of the state. The research demonstrates how such orientation accounts for subsequent reluctant tinkering with transformational efforts. It also resulted in sporadic, reactive and generally incremental concessions in the direction of workplace democracy.

Essentially, this study is about societies in conjunction with law. Inferentially, this means the impact of legal rules and agencies on society in the finding of solutions to societal problems. The study is not based on an assumed premise on the basis of which a credibility test may be made or comparisons drawn. The study sets out to study each society as a unique, discrete entity within a particular blend of social, historical, political and legal contextual permutations. The primary objective therefore is to examine and try to understand and appreciate the strengths, weaknesses, threats and both missed and potential opportunities of each, in addressing a specific social issue such as labour disputes.

This study adopts a 'law in context' approach as a sub-text within the broad framework of socio-legal studies. It does not derive from any abstract theoretical hypothesis. It is not based on any quantitative survey approach that warrants the administration of questionnaire. It is strictly an academic observation of distinct, discrete social formations. These are then considered as in transition along the continuum of their socio-economic developmental

trajectories. It also ascertains the ground realities such as the political economy of labour disputes. This study required an interdisciplinary perspective, using a sociological approach to the study of law. By consciously focusing on the central institutions of substantive law, it demonstrates the weakness of law's claim to autonomy, its factual interpenetration of all levels with more general structures of government power,

In effect, the conclusion drawn is that the attempt at effective dispute resolution, via the instrumentality of legislation, can lead to juridification, the multiplicity of institutionalised structures, over- administration and eventual dysfunction.

KEY WORDS: Labour Disputes, Dispute Resolution, The State, Labour Relations, Juridification, Command, Regulation.

CHAPTER ONE
Introduction

1.1 Background to the study

This study examines how three nation-states in the southern region of Africa, namely, Botswana, Lesotho and Swaziland, are grappling with the ever-growing complexity and sophistication of labour disputes. Rooted in administrative policy formulation, employment relations and the legal processes involved, this study extensively examines the political philosophy, methods, structures and rules of engagement that are comprehensively described as 'emerging' trends or realities. The study is an inductive research project, not a simple re-statement of doctrinal precepts or statutory law, and concerns itself with labour relations in these developing African countries within particular historical and social contexts. This is primarily because of the connection between the colonial state and the post-colonial state.

Part of this connection lies in the attitudes to labour issues that were initially reflected in the form, shape and scope of legislation. These attitudes were brought to bear on these societies, and the post-colonial society appears to have openly assimilated these attributes soon after independence. The post-colonial state then proceeded to consolidate them and only much later seems to be undergoing a reform of both its attitude and the legal framework that has been used to buttress its dominant position. Even then, the processes of transformation appear to be sporadic, reactive and generally incremental.

Secondly, the study asserts that the existence of a functional relationship to legal history lends relevance to the development of legal rules. Thirdly, such a relationship allows an understanding of how such regimes of labour law have been contextually developed and utilised along the path of each society's socio-legal evolution.[1] At another level, the subsumed path of the development of legal rules implies the movement of the general material conditions of that particular society.

This can help to explain, for example, why the common-law notion of a private transaction between two equal parties in a contradictory master–servant relationship was foisted upon the

[1] Aguda 'Legal Development in Botswana from 1885 to 1966' (1973) 5 *Botswana Notes and Records* 4.

colonies. In reality, this questionable market place equality was only a political or social justification for perpetuating the exploitation of the colonised. This notion was subsequently incorporated into the legal regimes that have since come to define certain forms of social transactions.

Relating these outcomes to the colonial state, one is led to conclude that, rather than enacting legislation in response to the actual realities of the territories, a mixture of labour legislation was introduced from different colonies into Bechuanaland, Basutoland and Swaziland, as they were then known. The primary purpose of these laws was subjugation. Inevitably, this mode of legislation also produced certain peculiar results. Firstly, the laws were complex. Secondly, these laws were considered alien, overly restrictive and punitive. Thirdly, considering the levels of socio-economic development, the laws were irrelevant.

These societies comprised essentially rural, pastoral people engaged in subsistence farming. Apart from the mines in South Africa and the rail transport system from Northern Rhodesia to the mines, there was no formal employment, no organised industries, no organised employers and therefore no formal employment environment.[2] The strategic partnership between the traditional authorities and the colonial master only succeeded in creating a more invidious form of dependency, exploitation and enslavement.[3]

Therefore, there could not have been workplace sub-cultures such as internalised dissatisfaction with working conditions or worker radicalism. In simple terms, the labour laws were far in advance of the pace of socio-economic development before and after independence. The longer they were retained intact, the greater were their chances of proving ultimately restrictive, unpopular and a potent source of labour disputes in the future.

Concepts of disputation and the institutionalisation of disputes are modern usages in terms of the language of disagreements and, at independence, had not filtered into the terminology of labour disputes. This is not to say that labour relations and the dynamics of the workplace did not have their own conflict-generating capacity. The public sector, the first area of formal wage and salaried employment, became the first localised formal grouping of workers with

[2] Tlou *A History of Botswana* (1984).
[3] Dale 'A Functional Web of Interdependence between pre-independence Botswana and South Africa: A Preliminary Study' (1974) 6 *Botswana Notes and Records* 120.

common interests. Formal, organised labour agitation was born with the advent of statutory provisions defining trade disputes as disputes of interest and disputes of right.[4] Therefore, any study of the phenomenon of collective labour disputes requires one to examine the effects of labour legislation and policy formulation on industrial relations and labour dispute resolution. This is the aim of this study.

The study argues that reality has demonstrated that industrial conflict poses certain challenges. These challenges include the attainment of industrial stability and socio-economic development. Secondly, for the study to achieve its aims, it must demonstrate a relationship with the immediate socio-legal and historical past. Another reason for this is that there may be latent, historically embedded, structured social stratifications and cleavages that are only now manifesting themselves. These may in turn explain the sporadic explosions of collective worker consciousness commonly characterised as industrial disputes. In reality, such manifestations of worker dissatisfaction may be instrumental in achieving short-term, wage-driven objectives rather than long-term political goals, as might be erroneously presumed.

It is argued in this study that the legislative focus of the political state could be misdirected if it is concentrated only towards dominance and the sustaining thereof. Most importantly, the pivotal role of labour law as the prime mover cannot be overlooked. In the following section therefore, the study introduces a range of issues pertaining to labour law, which will be debated in detail in chapter 3.

Definitions of the terms used in the study are presented in the next section.

1.2 Definition of terminology

This section provides a functional rather than a traditional definition of labour law and its elements. Botswana, Lesotho and Swaziland could be described as coming from a similar mixed legal background, and therefore they would exhibit similar frameworks of labour law. In these countries, responsibility for labour dispute adjudication is allocated to the bureaucratic structures assigned to labour matters. Industrial courts have been established, clothed in most instances with exclusive jurisdiction over trade disputes. Emerging

[4] Part 1 of the Preliminary Trade Disputes Act [Cap 48:02] section 2.

interventions in disputes form a critical part of the study because there is evidence of how external influences have assisted in some domestication of international minimum labour standards. The desirability of labour peace and stability as the rationale for any re-conceptualisation of labour law is implied. How these issues play out creates a functional context for both labour law and disputes.

1.2.1 Perspectives on labour law and labour disputes

Work relations are partially reflective of social dynamics. Therefore, in examining issues relating to disputes within the field of labour law, an exploration of a combination of factors becomes necessary. These include the statutory framework, principles of contract, property relations, obligations and the political philosophy of the state.[5] Labour relations have been defined in terms of the polarisation of relations between employers and employees. This is what Kahn-Freund referred to as 'relations of power'.[6] Previously, modern trade unions were seen only as the vibrant successors to the trade guilds and vocational groupings. Their roles included winning concessions and making gains from the employer in a regulated manner.

Labour legislation has since moved from the notion of conferring rights on workers to one of regulating the business environment by balancing management autonomy and worker protection.[7] The regulatory mechanism leaves scope for common-law principles and judicial decisions, neither of which has proven to be adequate. In effect, legislative intervention, common-law principles and judicial rulings have neither assuaged the anxieties nor lessened the aspirations of workers, because workplace arrangements cannot always be justified as grounded in consent.[8]

This study argues that the function of labour law is to acknowledge the need to strike a balance between determination from outside through regulatory controls and the level of intervention required to open up a wider range of choice for employees to challenge perceived bad practices by employers.[9] Regulation can therefore be described as mainly state

[5] Mitchell (ed) *A New Scope and a New Task for Labour Law – Redefining Labour Law* (1995) 5
[6] Kahn-Freund *Labour and the Law* (1972) 8.
[7] Davis & Freedland *Labour Legislation and Public Policy: A Contemporary History* (1993) xxxiii - 692
[8] Grint *The Sociology of Work: An Introduction* (1994) 15.
[9] Davis & Freedland supra.

intervention in private spheres of activity to achieve public goals.[10] From the foregoing, the regulation of labour disputes indicates their capacity to destabilise the industrial environment. Taken to their logical conclusion, labour disputes have the capacity to destabilise the state and social structures. The function of labour law should therefore be to mediate.

This study suggests that disputes are inherent in the workplace and should be handled within appropriate contexts, as this would provide a better orientation and approach towards dispute resolution. Legislation and policy could then be informed by the need to balance the positive and negative effects of intervention, provided such intervention also enables employers and employees to continue to engage with each other constructively in the workplace.

Over the past two or more decades, there has been a growing revisionist school of thought that considers the dysfunctional qualities of traditional labour law. The group, including Hepple,[11] Ewing,[12] Mitchell[13] and Creighton,[14] advocate a labour law paradigm that responds more empathetically to the realities of the workplace. Teubner[15] and Watson[16] postulate that opening up domestic juristic regimes to external influences through transplantation could rejuvenate the traditional labour law framework. Orucu,[17] among others, argues that comparisons facilitate the internationalisation of labour law, now due in view of globalisation. The ILO considers its principles to be the incontrovertible normative tenets for international labour law.[18]

1.2.2 Disputes and conflicts

Conflict connotes an intractable, interminable collision of opposing principles or incompatible perspectives. It is manifested through emphatic assertions often aggravated by

[10] Ibid 5.
[11] Hepple 'The Future of Labour Law' (1995) 24 ILJ 303
[12] Ewing 'The Death of Labour Law?' (1988) *8 Oxford Journal of Legal Studies* 293
[13] Mitchell (ed) *Redefining Labour Law: New Perspectives on the Future of Teaching and Research (*1995) vii-xv
[14] Creighton, 'The Internationalization of Labour Law' (1995) 90-120
[15] Teubner Legal Irritants: Good Faith in British Law or how Unifying Law ends up in New Divergences (1998) 61 *MLR* 11
[16] Watson, *Legal Transplants: An Approach to Comparative Law*(1974)
[17] Orucu, Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition (2000) 4 (1) ECJL 1-116
[18] Ezzy, Globalization and Labour Standards: A Review of Issues (2000) International Labour Review 136 and Sappia, 'ILO Labour Justice and Alternative Dispute Resolution of Collective and Individual Labour Conflicts' (IACML/ILO Project) Working Paper 147. Also Committee of Freedom of Association Report (2001) 326 and the ILO Declaration of Fundamental Principles and Rights (1998)

the hardening of assumed positions. With determination it may be managed, moderated or avoided. On the other hand, disputes suggest arguments over the correctness of assertions or alleged facts with a desire to convince. It is therefore debatable whether conflicts really exist in the employment arena and, if they do, whether they are easier to resolve than disputes. Rights arise from the terms of a contract and interests are threatened only when the applicable interpretations are not acceptable to either party. The question at hand would appear to be the levels of conflict, the acts of commission and omission that may constitute conflict, and which of these can be defined as disputes. In any case, whether conflicts can be solved without recourse to accepted procedures is equally debatable.

For example, statutes define a 'trade dispute',[19] but none appears to define a conflict. A dispute conveys disagreement between parties over a specific issue or subject matter. It does not imply a permanent impasse. It is posited that conflict has now become more descriptive of acrimonious relations between countries or internal power struggles than workplace contractual misinterpretations or disagreements. However, the terms are used interchangeably in this study. Since the issue of disputes is central to the study, this will be debated in detail in chapter 3.

1.2.3 Industrial relations

For the purposes of this study, labour relations is seen as an area where legislative intervention, in addition to management doctrines and practices, could promote industrial democracy.[20] Industrial relations is usually that web of interrelations between employers and employees. Labour disputes occur within the production environment, ostensibly mediated by labour relations systems. The state is both an employer and an arbiter in labour relations.[21] It follows then that where the state adopts an interventionist role in labour relations, it reacts as a stakeholder. Thus state-driven industrial relations can be seen as a process of structuring the labour market in order to achieve a stable socio-economic environment. Such a method is reminiscent of both the colonial legislative framework and the logic of capitalist development.[22]

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[19] Trade Disputes Act [Cap 48:02] of Botswana Part 1 – (Interpretation: Part 1).
[20] Landbury & Versevis, *The Future of Industrial Relations: Global Change and Challenges The Future of Industrial Relations: Global Change and Challenges* (1995) 5.
[21] Ibid.
[22] Ibid.

In sanctioning compulsory dispute resolution, the state assumes a defensive posture on behalf of the public in labour relations. By curtailing strikes and other manifestations of dispute, the state contains conflict and maintains civil peace.[23] More importantly, through legislation, the state steers labour relations in a preferred direction, using the law as an agent to regulate the parameters of workplace relations.[24]

1.2.4 Institutions and institutionalisation

The institutionalisation process is central to the general notion of labour law. According to Crouch, an institution is constituted as–

> patterns of human action and relationships that persist and reproduce themselves over time, independently of the identity of the biological individuals performing within them. Sociologists have long understood such a concept, but much of this earlier history has been ignored by recent political scientists and others who have come autonomously to the idea of the institution as they sought to convey the idea of behaviour being shaped and routinized, fitting into patterns, which are not necessarily those that would be freely chosen by a rational actor needing to decide what to do.[25]

All institutions undergo change. Institutional change is defined as change in an entire class of organisations. Institutional change at its deepest level refers to changes in the ideas that govern institutions, for example, the employment contract, and, as these ideas change, rules and practices shift as well. Institutional change on the shop floor may suggest that this clear-cut division is replaced by fragmented vertical and horizontal levels of labour relations. Institutions and structures change in diverse ways. A specific form of response to developments may require new adaptation or transformative change. Such change could result in a re-definition of workplace conduct or even stability. Change may also occur if a political institution redefines loyalty, legality and stability, thus applying new standards.[26]

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[23] Bellace (1992) *The Role of the State in Industrial Relations (1992)* Proceedings of the World 9th Congress IIRA, Sydney, Australia

[24] Park, S. 'The Role of the State in Industrial Relations: The Case of Korea'(1992) 9th World Congress of the International Industrial Relations Research Association (IIRA) No.32 of Note 27

[25] Crouch *Capitalist Diversity and Change – Recombinant Governance and Institutional Entrepreneurs* (2005) 10.

[26] Freedland & Kountouris 'Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe' (2008) 37(1) *Industrial Law Journal* 49–74.

In effect, legal concepts such as labour law, when formulated, ultimately create institutions through the complex process of identifying crystallised patterns of socialised conduct and by analysing them within an ideological context. This process produces a normative institution that applies to the state, regulation or the employment contract. Private organisations then forage among these institutionalised structures in search of jurisdictions that can be the most sympathetic regulatory environment. These may include the location of labour markets and entrepreneurship.[27]

1.2.5 Regulation and juridification

Regulation presupposes that the essence of the state within societies is primarily to impose a form of structured control, whose ultimate objective is to sustain the political *status quo*. The state sets the limits on private conduct within the ethical parameters of the political and ideological choices it makes. Formal institutional structures act as agents for the forms and nature of various social formations or groupings.[28]

Juridification is a term increasingly occurring in the widest range of contexts. Its use is, however, probably nowhere more justified than in a discussion of the structure and the objectives of labour regulations. It could be said that labour law constitutes the classic paradigm for juridification. In terms of both the background and the evolution of the juridification process, the context of the origin and the development of labour law provides a practically suitable environment.[29] This captures the phenomenon of path dependency, where the past indirectly exerts sway over the present.[30] Juridification also occurs because the state, unable to make substantive laws anymore, vests such authority in its bureaucratic agencies to make even more regulations and rules.[31]

1.3 The research problem

1.3.1 Introduction

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[27] Freedland & Kountouris, op cit.
[28] Menocal, 'And if there was no State? Critical Reflections on Bates, Polanyi and Evans on the Role of the State in Promoting Development' (2004) 25(4) *Third World Quarterly* 765–777.
[29] Simitis 'The Juridification of Labour Relations' (1986) *Comparative Labour Law and Policy Journal*, 7
[30] Ibid.
[31] Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239–285.

In the light of the explanations above, it is necessary to lay down a functional premise for determining the problems that generated this study. Essentially, this study appreciates the significance of labour disputes. Therefore, it probes certain issues which, though legal in nature, are also political and administrative. The study is about three countries studied and observed in transition. This resulted in the analysis of certain events, including the actions of legal rules, structures and processes. These actions impact on these specific communities in terms of how the challenges generated by a particular set of problems are being met.

The study sets out to examine each society as a unique and discrete entity existing within a particular contextual blend of social, historical, political and legal permutations. The primary objective is not to compare or contrast the societies, but to try to understand and appreciate their strengths, weaknesses, threats and opportunities with regard to the resolution of labour disputes. In addition, the study is also mindful of both the missed and potential opportunities of each country in meeting the challenges of social issues such as labour disputes.

1.3.2 Specifics of the research problem

The thesis revolves around a research problem which is summarised below:

Post-colonial societies in Southern Africa have gradually been coming to terms with the need to industrialise and diversify their raw material-based economies. This calls for a close identification with organised, bureaucratic and corporatist modes of capitalist production. One major result of this is the creation of the employment contract under which an employee has to sell his or her labour power under specific conditions in order to obtain rewards that are market-related. In this atmosphere, problems are bound to emerge. In their different forms, conflict, disagreement, incompatibilities and frictions are then generally described as disputes.

Disputes cause labour and industrial instability and at times political upheavals. Ideally, they need to be pre-empted and settled whenever and wherever they surface. Unfortunately, the efforts of state and international best practice interventions in Botswana, Lesotho and Swaziland do not appear to be meeting these goals effectively. As such, labour-related disputes are virtually institutionalised. The objective therefore is to locate the patent and latent causes of these disputes, and examine how they occur. Finally, the aim is to investigate

why the current methods appear to be inadequate and suggest how best the current situation may be improved.

The study implicitly acknowledges that admirable efforts have so far been made in the area of labour dispute resolution in Botswana, Lesotho and Swaziland. These may be collectively referred to as 'emerging trends'. Despite these progressive trends, the regressive 'current realities' convey a picture of inadequacies in relation to the desired levels of labour justice, peace and industrial stability.

Given that the study is about labour dispute resolution, an interdisciplinary and holistic approach was adopted. This is to allow for an informed evaluation of existing approaches and present state-driven legislative and policy interventions. In terms of labour dispute resolution, there is a preoccupation with structures and institutions at the expense of a thorough comprehension and conceptualisation of labour disputes. Labour disputes are located within social processes. Therefore, the primary concern should be with a proper contextualised understanding of the disputes and the environment in which they occur. Another issue is whether superimposing formalised structures on social processes and formations has minimised labour disputes or has only created dysfunctional institutions and structures.

The study also argues that although the legal framework within which the process of identifying and resolving disputes occurs is the applicable local labour law regime, this regime's connection to local social history and therefore development must not be ignored. Furthermore, the legal environment of dispute resolution is entwined with the regulation of conduct within the wider society, such as in the arena of labour market regulation and industrial relations values.[32] This indicates that one way to understand the causes of disputes and the current efforts to resolve them is to examine and evaluate the form, function and purpose of the legal rules that were created to regulate social power.

1.4 Research concerns and questions

Trade dispute resolution covers a wide range of issues. The focus of this study, however, is to try to examine the policy-directed functions of institutions, the philosophy of the state, and

[32] Felstiner et al 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1981) 15 *Law and Society Review* 198-401.

how these inform the approach to the problem both legally and administratively. The study is therefore guided by certain concerns whose formulation is intended to assist in the examination of the key issues as identified. These issues are stated below:

a. To examine the methods currently used to resolve labour disputes in Botswana, Lesotho and Swaziland;
b. To identify the indicators currently used to measure the efficiency and effectiveness of the form and processes of interventions in these countries;
c. To investigate, locate and explain how certain factors, patent and latent, with roots in the recent colonial past have contributed to the intransigence of workers and the intractability of labour disputes;
d. To explore the possibility of utilising other methods to eliminate, reduce or manage the explosive potential of labour disputes in these countries; and
e. To specifically locate any elements in the makeup of the post-colonial state that can explain its role in labour disputes today.

1.5 Research objectives

In line with the exploratory concerns above, the study addresses, among others, the following issues:

a. The nature, functions and effect of interventionist policies (emerging trends) in labour relations and labour dispute resolution in Botswana, Lesotho and Swaziland;
b. The nature, roles and impact of the state on labour relations and disputes, both as an employer and mediator, and in relation to other social actors in labour relations in these countries;
c. The suitability (or not) of transplanting legal reforms, and the capacities of institutions and structures in the context of the realities on the ground in these countries;
d. The environmental factors accounting for variations in the effect of similar institutions performing similar functions in these neighbouring countries with common colonial, geo-political and socio-economic backgrounds.

1.6 Research justification

From the foregoing, the value of this study lies in its close, continuous observation of how these three members of the Southern African Development Community (SADC) are addressing the problems of labour disputes. Secondly, the study examines the impact of these countries' legal and other institutional frameworks or emerging trends and realities on labour dispute resolution. The study also indirectly assesses the degree and efficacy of efforts to domesticate some aspects of international labour standards. Looking to the future, the findings of the study are important in the context of a framework for regional integration and comparative studies.

Although the study is not intended to discuss international labour standards, it assumes the position that these standards underpin fundamental rights and equality of treatment in employment. These elements of doctrinal issues are also regarded as being generally accepted as benchmark indicators. This study expects a combination of results that reflect the complex and interrelated nature of social and relational issues. In light of international developments, regionalism and also a new form of social accountability, the study expects to push the frontiers of current debates in an area where law must account for its expected reflection of social reality.

This study argues that the radicalisation and polarisation of workplace relations, and perennial conflict and tension are an indictment of the legal and political systems operating in these countries. They therefore pose interesting challenges and are sufficient reasons for such a study.

1.7 Research methodology

This study adopts a law in context approach. As said elsewhere, this study is an observation of social processes in three countries from an interdisciplinary perspective. The perspective is anchored in labour law principles and precepts. Its intention is to study, observe, and draw conclusions, which will convey the interdisciplinary scope of the research.

The thesis is strictly a desk-top study of distinct, discrete countries from the perspective of labour law and relations and other regulatory frameworks. It is therefore necessary to first

identify the particular legal function in question, such as statutory labour dispute resolution, among others, using appropriate concepts and methods deriving from the sociology of law. It must be reiterated that this study is based on the interdisciplinary perspective of the researcher, drawing its strength from law, political and administrative science, and employment relations.

In adopting this approach, the study draws upon Cotterell, who advises that by using a sociological approach to the study of law, and by consciously focusing on the central institutions of state law, one can attempt–

> to show the weakness of law's claim to autonomy as explained earlier. Such sociological approach is capable of the interpenetration of all levels within the more general structures of government power, wider currents of ideology and diverse but often interconnected forms of knowledge usually considered external to law.[33]

For example, the state bureaucratic structure wields both administrative and political power, which may not have been conferred by any statute, and this situation can result in over-regulation, the over-administration of organised labour and dysfunctional dispute resolution procedures.

The study deals with Botswana, Lesotho and Swaziland in terms of whether they are achieving at least significantly reduced levels of labour disputes. The study examines both primary and secondary data within the relevant social and legal contexts. This provides an insight into the regimes of law currently applicable and also the current literature on the subject matter. The intention is to capture not only the letter but also the spirit of labour policies, the laws and their ground effects.

1.8 Structure of the study

The study is divided into nine chapters. Chapter 1 comprises a brief introduction to the broad range of issues that will be raised in the study. Chapter 2 covers a broad historical and conceptual framework for labour law and labour disputes. This chapter is pivotal to the study

[33] Cotterell, R. 'Law and Sociology: Notes on the Constitution and Confrontation of Disciplines' (1986) 13 *Journal of Law and Society*, 312.

because the fundamental premise of the study is that contemporary structures and regulatory and arbitration measures may fail, and there may be lessons from the past that suggest that the causes of labour disputes may not be so easily discernible.

Chapter 3 provides a review of key concepts on the subject matter. As the chapter covering the literature review, it attempts to locate relevant themes in intellectual debates and discussions about labour law, dispute resolution, and related emerging trends. Chapter 4 identifies the structures, agencies and other actors that have been created for the implementation of policies, the realities of such activities, and their effects on labour disputes. The chapter first delineates a general investigative framework that encompasses the constitutions, legislation and the international law dimensions as represented by the International Labour Organisation (ILO). It then creates country-level purposive sub-sets. This framework is then used to measure the degrees to which disputes related to these elements of the employment relations have been successfully resolved, settled or managed.

Chapter 5 examines the state as the dominant actor in the area of employment relations. Chapters 6, 7 and 8 cover Botswana, Lesotho, and Swaziland respectively. In chapter 9, an integrated synthesis is adopted to determine points of incidental convergences and divergences in legal rule formation, policy formulation and implementation. This chapter also covers institutional functions, effects and constraints. A review of the main themes presented in the study is then undertaken. The conclusion examines future prospects, challenges and the direction of labour policy in these countries.

CHAPTER TWO

A Historical Overview of Labour Relations and Disputes in Africa

2.1 Introduction

The overall aim of chapter 1 was to set out the structure of the study. The chapter also provided a preliminary background and gave a definitive scope to the study. One of its objectives was to underscore the role of labour disputes, which form the basis of this study. This goal was to establish what efforts are being made in relation to understanding trade disputes, their causes, and workable methods of preventing, settling or resolving them. Each section of the chapter dealt with components, including the conceptual and methodological issues. The chapter also laid the foundation for underscoring the role of historical continuity or inter-relationships between the colonial and post-colonial state.

Chapter 2 continues in this vein, but provides a social, legal and historical basis for the study. The chapter surveys the global terrain and narrows it down to the African situation where the study is located. The study is premised on the assertion that, firstly, labour issues cross geographical boundaries in humanity's existential and acquisitive endeavours. By implication, the processes of the division of labour and their attendant inequalities have been a sociological fact all along.

Secondly, within the context of this study, colonialism did not only come with invidious intentions, but also left in its wake long-term debilitating effects, including societal polarisation, segmentation and deep-rooted, sustained socio-economic disparities. These phenomena are intricately connected to workplace relations which in turn are characterised by the needs, desires and aspirations of the worker. The chapter affirms therefore that it would be a misinterpretation of African labour history to assume that the colonising powers wished to promote progressive industrial relations.

Thirdly, the conduct of the colonialists prior to independence was dictated by unexpected events. These included the inevitable political awareness of the people and the increasingly radical demands for greater political influence.

Fourthly, and more importantly, people's gradual realisation of the exploitative nature of industrial relations triggered the numerous strikes that occurred in the supposedly docile British East and West Africa and the High Commission Territories of Bechuanaland, Basutoland and Swaziland, either overtly or in subtle ways.

In addition, the most obvious lessons from this past, as shown in this study, are the modes of utilising legal regimes to institutionalise the conflict between employees and employers. Such conflicts resulted from dissatisfaction with depressed wages and the high cost of living, together with profitable industrialisation. *A priori*, the stage was set for the post-independent state to continue from where the colonial master left off.[34] For example, there was the perception that migrant workers from Northern and Southern Rhodesia were potential importers of labour agitation into Botswana. The reality, however, was that these employees, not open to collective union culture, became victims of the post-colonial state.[35] Such an uninformed attitude found its way into the laws enacted with regard to trade unions and their office-bearers. It must be noted that the grand scheme of dispossession, either blatantly or by subterfuge and impoverishment of the natives, was conducted within the general framework of a dubious evangelising and civilising mandate and mission. This mission created questionable justification for the importation and application of legal regimes that fostered the restriction and control of particular aspects of socio-economic life.

This is the context that was defined in terms of a labour law and labour relations environment. However, law, at whatever stage of a society's development, is a reflection of the dynamics, shape and form of the material and social conditions, and therefore the history of that society.[36] With regard to the colonial realities, therefore, although labour law ought to have been concerned with workers and their problems, it became an instrument for the regulation of details such as wages and taxation, and the movement and location of the colonised.[37]

In this instance, labour law simply performed a more direct role of legalising but not legitimising the expropriation process within the general legal framework. Colonial labour history is thus replete with records of forms of imported and engineered administrative

[34] Cooper in Gutkind et al *African Labour History* (1978) 225.
[35] Ibid 266.
[36] Shivji I.G. '*Law, State and the Working Class in Tanzania*' (1986) www.alibris.com (27/10/2015)
[37] Beyeme *Challenge to Power* (1980) 256.

strategies necessitating the implanting of alien culture and institutional sub-cultures in those local assistants identified to facilitate the extraction and expropriation processes. As noted by Saul, one historic function of imperial penetration was to transform a segment of the able-bodied males into wage labour while another was trained to staff the lower echelons of the colonial state apparatus. Another segment was compelled to work the extractive and (later) semi-industrial sectors developed by such penetration.[38]

While this practice resulted in the concentration of cheap labour, it also led to the breeding of a local cadre imbued with the colonisers' attributes. These attributes included the application of forms of regulation, legislation and policy formulation. This allowed for the imposition of compliance and coercion using different methods. It is accepted that not all colonial policy was repressive. There were instances of incremental improvement but these were only after mediation, both internal and external.[39] It must be observed that the Fabian Society did admit that 'our relatively high standard of living is maintained, in part, by the low standards obtaining in other lands, especially in the colonial territories. [However], the large body of poorly paid colonial labour also constitutes a threat, conversely, to the higher standards at home and forms an infectious centre of discontent.'[40]

Essentially, the colonial era demonstrates how localised labour law became a typical example of the transformation of foreign legal rules. Such rules became the machinery for the exploitation of labour. The rules were also aimed at consistently relegating workers to a perpetually subordinate position. It is argued in this study that subsequent events have shown the close affinity of the post-colonial state to the previous one. An example is the penchant for juridification. The goal of exploitation and the extraction of wealth in non-wage and pre-capitalist societies became the formalised relationships of master and servant. This became a key factor and, therefore, a cause of subsequent labour disputes.

For example, the process of profit-making led the colonial system to unwittingly initiate the conditions for structural and systemic differentiations. This in turn came to underpin employment relations in the future as these societies became *de jure* and *de facto* sovereign nation-states. This study demonstrates the degree of the colonial impact, and then ascertains

[38] Saul in Sandbrook & Cohen *The Development of an African Working Class* (1975) 305.
[39] Despatch No. 101 (21/04/1942) *Colonial Labour Problems* Fabian Society Research Services Release No. 61, 1942.
[40] Ibid.

to what extent the post-independence states have shed their colonial baggage. The next step is to distil the inherent contradictions that persist and examine how these are stoking the fires of workplace agitation.

This chapter restricts itself to the African historical context as much as possible. The study argues that this historical framework is necessary, primarily because those who refuse to learn from the mistakes of history repeat them. The present mirrors the past just as it will mirror the future. Further, the study suggests that within the oppressive aspects of work in the past could be embedded some latent causes of the intractability of labour disputes today. Volatile and disruptive labour disputes are mainly periodic episodes in the evolution of workplace social relations. These derive from the nature of social formations and their relations with each other, along either a pre-determined historical path or an inevitable realisation of incompatibility.

It appears that labour relations are therefore microcosmic reflections of societies, especially those in relative transition, and the dynamics of interpersonal relations between employers and the employed. History also helps to explain and illustrate how conflicting social interests have been accommodated, mediated and resolved. This chapter revisits labour or social history to illustrate the roles of key social actors over time and how these could help in understanding the complexities of labour-related issues and why disputes form such an integral part of today's bureaucratically organised workplaces.

Labour has, since antiquity, been considered as work done by the mind or body, either partly or wholly for the purpose of utilities.[41] However, 'labour' used without qualification has come to denote the doer of work or hired labour. Even this definition was socio-economically differentiated and used more in reference to hired, unskilled, manual workers than to self-employed workers. While labour also means work, it has come to mean more of a conceptualised labouring class. This class would then include the pre-Industrial Revolution reproducers of their own labour potential, agricultural tenants, serfs and contract artisans. Subsequently, this would come to include all wage-dependent workers. Modern legal rules have contributed to this state although there were processes of alleviation and mediation of the gross imbalances in the allocation of and access to social and economic resources. In

[41] Catholic Encyclopaedia; *Labour and Labour Legislation* vol. III (1910) available at www.newadvent.org/cathen/08719.htm (2001)

essence, the study contends that labour disputes are embedded in socio-economic and labour history. In effect, labour history dates back to Roman times.

The common-law contract of employment and its actualisation dates back to Roman law, specifically the concept of *locatio conductio*. This included the *locatio conductio rei*, the *locatio conductio operis* and the *locatio coductio operarum*. The contract of service was available only to a given class who engaged in *operae illiberales* or menial tasks. Voet and Grotius noted a close similarity between the *locatio conductio rei* and the *locatio conductio operarum*. This is largely because slaves in Roman times could not let their services for hire. Therefore, the contract of employment subsequently made more sense with the advent of capital and factory employment. Before then, the incidence of 'hired' labour occurred mostly at the domestic level and in relation to apprenticeships.[42]

In Roman law *locatio conductio operarum* is defined as–

> a consensual contract whereby a labourer, workman or servant as employee (*locator operarum*) undertook to place his personal services (*operae suae*) for a certain period of time at the disposal of an employer (*conductor operarum*) who in turn undertook to pay him the wages or salary (*merces*) agreed upon in consideration of his services.[43]

As observed, these fine distinctions did not mean that Roman law was just. In fact, the law did not apply equally and if a wrongdoer came from the wealthy classes, then he might escape punishment, whereas a poor man could not. One outcome of this inherent injustice of the law was the emergence of disputes. Aristotle proposed a philosophical basis for dispute resolution. In the *Ethics* he stated that–

> the equitable is better than a certain kind of 'the just'. So 'the just' and 'the equitable' are the same, both are good but 'the equitable' is superior. The difficulty arises because 'the equitable' is just but not 'just according to the law'. It is a correction of legal justice. Law is general and it is not possible to deal generally with some matters.[44]

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[42] Grogan (2001) *Workplace Law* (2001) Juta Law 3.
[43] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 56–57.
[44] Aristotle *The Nicomachean Ethics* (9-20) in Roebuck *Ancient Greek Arbitration 700-30 BC* (2001).Arbitration Press.

Factually, events in Europe did not radically shift from the Roman era's sociology of law.

Whatever injustices and grievances might have been generated under Roman law followed the Roman Empire into Europe and ultimately to Africa via colonialism. This is why the colonial masters could not design contextually appropriate legislation for each of the colonies[45]. The colonial state imposed wage ceilings, fixed prices and acted as a buffer for the elite against the peasants. However, over time, the weaker social groups – serfs, artisans, and others, through socialisation and collective mobilisation – won greater shares of power and resources, using their associations as bargaining entities. They also then made opportunistic alliances with rival groups above their stratum. Their numerical strength became crucial as an indicator of the combinations or unions of the future.

Most importantly, the underpinning element in their agitation was a growing dissatisfaction with the *status quo*.[46] The evolution towards the individualisation of employment had certain results which paradoxically included a need by labourers to band together to safeguard their common interests. Herein lies the genesis of the subsequent formalistic evolution of labour relations or industrial relations.

2.2 The African context

In this section, the study contends that the colonial state demonstrated little evidence of consulting the colonised, whose lives were regulated and regimented through labour legislation and its politics. The rationale for this contention is provided below.

2.2.1 The pre-colonial era

Before discussing the role of the colonial state in employment relations it is necessary to examine the previous *status quo* relative to dispute resolution in traditional African societies. In the absence of a money economy, transactions were characterised by barter. There was communal exchange of labour which was voluntary, and suitors might often work on the in-laws' farm to demonstrate capacity. Individuals could offer themselves to prosperous families for apprenticeship. There were instances of indentured labour and people were hired to

[45] Priscus of Piamin in Harris, *Law and Empire in Late Antiquity , 3-5 AD*
[46] *Ibid*.

provide contract specific services or daily labour for wages. The usufruct was also utilised to provide access to land and proceeds from cultivations.

In the event of disputes, complaints went through the family to the chief where fines were imposed. Arbitration and other dispute resolution mechanisms were thus not colonial imports, as African societies had always used them in governance and judicial processes. Formal adjudication was done through elders, headmen and the courts of chiefs and kings. Customary arbitration decisions were published and parties were often compelled to comply by an inherent obligation to obey the chief.[47]

The advent of colonialism brought the statutory formalisation of dispute resolution and the split into Anglophone and Francophone arbitral rules and practices. The importation of political, economic and social arrangements, a cash economy, forms and structures of exchange, and the formalisation of transactions brought with them significant changes. Laws, rules and regulations followed these practices and transformed these societies and most institutions of social order. Among the changes were imported and imposed labour laws, the subsequently institutionalised common-law contract of employment, and attendant structured relationships, some of which are examined below.

2.2.2 The Southern African perspective

The Southern African region is discussed as a collective since the historical issues addressed affect the sub-region in an integrated manner. This recognises the fact that much legislative activity emanated *ex cathedra* from South Africa, mainly from the Cape Colony, which was the seat of the British High Commission. This examination takes into account the predatory nature of colonial penetration and how this evoked resistance and rebellion. In contemporary terms, these reactions would have been variously described as organised group anarchy, conspiracy, insubordination or industrial sabotage. These were genuine reactions to aggressive dispossession, and the cumulative effects of dislocation from ancestral lands and forms of economic and subsistence activity.

[47] Cotran & Amissah (eds) *Arbitration in Africa* (1996) xxiv- 467.

In 1820, 5,000 British settlers from economically depressed areas in Britain arrived in the Eastern Cape, where for ten years labourers had started apprenticeships at the age of eight. In 1823, the Cape administration introduced laws that attempted to regulate the hours of work and the provision of food for slaves. It is not surprising that the first recorded uprising by slaves and Khoi-Khoi labourers against their owners occurred in 1825. At this point, there were two poignant by-products. First, the British Parliament enacted the Abolition Act. While this Act abolished the system of slavery, it introduced an indentured labour system, and gave it the same 'apprenticeship' description. Actually, this Act ensured that slave-based economic exploitation in the British Empire remained intact. As a result, slaves embarked on different forms of passive resistance and about 59,000 slaves disappeared from their workplaces. Thus, desertion and insubordination became characteristics of the slave–master relationship.[48]

This shows that the colonial state was patently dishonest and predatory. It should be noted that reaction to perceived injustice, within and outside the workplace in a capitalist or pre-capitalist environment, is expressible in various forms that are symptomatic of labour-based disputes. Worse still, the advent of a cash economy meant there was a need for more hitherto cheap labour which had become scarce due to the weak but enabling environment. It meant other methods had to be used to keep black labour in bondage and harness. The few privileges accorded to the dispossessed natives were taken away by subterfuge or through the sheer belligerence of the white settlers long before apartheid was born.[49]

Thus, in South Africa, while it would have been appropriate to view labour policy as a product of industrial society, the processes of rule-making were driven more by the need of the state to protect its interests by mediating in the power play between employers and employees. Thus, along the way, the South African state engineered different modes of legal containment including strong corporatism, co-optation or reward and appeasement.

By 1924, two goals defined the then South African government's domestic policies. On one hand, the government needed to entrench the colour bar in industry and on the other to consolidate the 'two-stream' concept of South African nationhood. The state distinguished between 'civilised' (white) and 'uncivilised' (black or African) labour. It then sought to entrench the positions of whites through laws such as the Wages Act (1925) and the Mines

[48] South African History Online (http://www.sahistory.org.za) August 2015.
[49] Ibid.

and Works Act (1926). While the Wages Act provided for the unilateral determination of wages and conditions of work by the white employer, this was permitted only if there was no agreement between him and the white employees. This was provided for under the Industrial Conciliation Act (1924), which sought to centralise labour relations.

There was no such statutory bargaining position accorded to blacks. South African labour relations were also influenced by Verwoerd's 'Bantustan' master plan. For example, in South West Africa, the 1964 Odendaal Commission Report recommended that 40 per cent of the territory should be sub-divided into 'homelands' or 'Bantustans' for the natives and the rest *permanently reserved* for whites. This entailed the forced relocation of about 40,000 Africans from reserves, farms or urban locations.[50]

In South Africa, therefore, the main thrust of state activity from the colonial era until recently had been a legislative regime that promoted the supremacy of the white employer and the formalisation of a dual system of labour relations. The most definitive statutes of the structured social cleavage were the Masters and Servants Acts. These Acts, which were passed between 1856 and 1904 (in the four territories), remained in force after the ratification of the Union. They made it a criminal offence to breach the contract of employment as earlier indicated. Desertion, subjectively defined insolence, drunkenness, negligence and strikes were also criminal offences. Theoretically, these laws applied to all races, but the courts held that the laws applied only to unskilled work, which was performed mostly by black people.[51]

Although the Masters and Servants Act had begun the process through the criminalisation of contractual breaches, the Black Labour Relations Act[52] became the high water mark of this policy. It retained the penal provisions and imposed certain legal duties on both employers and employees.[53] The Labour Relations Act, enacted after the Wiehahn Commission Report of 1979, did little to assuage the tension within the black populace, as it excluded farm and domestic workers.[54] The labour unrests of 1973 around Durban and that of Soweto in 1976 demonstrated the explosions of disenchantment at the levels of legalised discrimination and

[50] Moleah *Namibia: The Struggle for Liberation* (1983) 34.
[51] South African History Online http://www.sahistory.org.za) (August 2015)
[52] No 67 of 1964.
[53] Grogan *Workplace Law*. (1999) 4-5 Juta Law
[54] Op. Cit.

exploitation. More importantly, such institutionalised social injustices found their way into the causes of labour disputes because of the socio-economic effects of wage dependency.

2.2.3 The colonial experience in Swaziland

In keeping with the structure of this study, an investigation of the history of labour and the embedded causes of disputes in Swaziland is required. This will provide not only a historical setting but a longitudinal perspective on the legislative and socio-political issues and policy reactions that shaped the present situation in Swaziland.

Swaziland is a kingdom purportedly governed as a sort of modernised traditional monarchy. In reality, the king embodies legislative, judicial and executive powers. The legal system is a dualist mixture of unwritten law and custom, with enacted laws and administrative agencies created by a partially elected Parliament. The 1968 Constitution was abolished in 1973 and the political expression of opinion became possible only via the semi-elected Parliament and the 'Tinkhundla' system of village-level meetings of a supposedly non-partisan nature.[55]

To a large extent, Swaziland is still what it was carved out to be: a dependent economy and a haven for entrepreneurs, mainly from South Africa. Most of the population engage in subsistence agriculture. Therefore, it operates a free market economy with little or no central intervention. The king, with his coalition elite, operates a quasi-corporate organisation by Royal Charter, which maintains large investments in the major sectors of the economy, such as industry, agriculture and services that need partnership with foreign investors.[56] The Swazi king used 'concessionairing' as a trade-off for stability and security. The immediate but long-lasting result of this was that the most viable areas of land were handed over to expatriates who, while achieving freehold rights, created the impression of being usufruct holders in conformity with the cultural norms of the Swazis in relation to communal property.

2.2.3.1 Creating an exploitative environment

The genesis of Swaziland's labour laws lay in the perceived need to contain and accommodate socio-economic changes likely to flow from the structural economic disparities

[55] http://www.sahistory.org.za (August 2015)
[56] Ibid.

that expropriation and starvation wages were likely to produce. In political terms, annexation was deemed to imply absolute jurisdiction and sovereignty. However, Swaziland remained essentially a protectorate, a labour reserve to be utilised by both South Africa and Britain at minimal cost.

It needs to be remembered that the regime of laws was, for the most part, the same for all the three High Commission Territories (HCTs) that had identical judicial systems. These systems were later headed by an HCT Court of Appeal established by an Order in Council in 1955. It is equally important to remember that although judges, in theory, do not make law, by merely expounding on the unknown they turn it into law and thus impact on its shape and form. They were therefore equally instrumental in the evolution and impact of the legal framework.[57] The first anti-labour law was the Swaziland African Labour Proclamation 45 of 1954. This was intended to consolidate and amend the law relating to the recruitment and the contracts of employment of African workers in Swaziland.

The Proclamation defined a 'contract' contextually as service by a manual worker (para 2) and also provided for labour agents and runners. The Proclamation further defined a 'worker' as specifically an African and by implication excluded blacks from the purview of the common-law notions of contract. It constructed a special contract status for Natives subject only to changes by the Resident Commissioner. This regime of laws also included the following statutes: the Aliens Act, the Employment of Women and Children Act, Incitement of Natives to Rebellion Proclamation (1899), the Maintenance of Peace Act (1907), the Master and Servants Act (1925), the Native Administration (Consolidation) Acts (1941, 1950), the Native Labour Contracts of Employment Act (1942), the Trade Unions and Trade Disputes Act (1942), the Workmen's Compensation Act (1949), and the Works and Machinery Act (1934), among others.

Given the levels of socio-economic activity the only purpose of these laws could have been to severely regulate, control and, where necessary, exact free labour as punishment. Through these legislative mechanisms, the HCTs became labour reserves for the sugar plantations and mines in South Africa and Swaziland. This state of affairs produced the first indigenous labour agitation in the form of a strike in the Havelock Asbestos Mine in 1948. By 1962, the

[57] Denning 'The Changing Law' (1958) 2 *Journal of African Law* viii.

Swaziland Mining Workers Union was formally established and operational, with the next two years witnessing a spate of labour unrests, arrests, trials and imprisonment. These workplace reactions were protests against a system perceived to be inhumane, callous and exploitative.

By 1960, the capitalist expansion through the repressive taxation and externalisation of labour power resulted in a shortage of labour for the domestic market. As a result, the need arose for some form of improvement in labour conditions for inducement and retention purposes. Between 1960 and 1980, events had created a situation that called for a new appraisal of labour issues. One event was the strike of 1963. The state reacted in fear and called for external assistance to quell the strike.

2.2.4 The Basutoland experience

The British did little to develop Basutoland, which increasingly became regarded as little more than a labour reserve to service the needs of the farmers of the Orange Free State and the gold mines of the Witwatersrand.[58] This position was confirmed by Elredge.[59] As with other British colonies, the contradictions between emerging and rapid social and economic change and the outmoded forms of indirect rule became pronounced.[60] A new sense of nationalism and entitlement resulted in a challenge to the legitimacy of both the colonialist power and its collaborationist traditional elite. The emergence and impact of apartheid in the South African economic strata, where the majority of Basotho males worked and earned their living, had a direct and radicalising effect on the socio-economic and political dynamics of the society.[61] For example, the kingdom's most fertile land – and what would later be most of its mineral deposits – was ceded to South Africa.[62] This left the Basotho with only barren mountains and isolated villages.

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[58] Lodge et al (eds) *Compendium of Elections in Southern Africa* (2002).
53 Eldredge *A South African Kingdom: The Pursuit of Security in Nineteenth-Century Lesotho* (1993).
54 Lesotho Government *History of the Basotho* available at http://www.lesothoemb-usa.gov.ls/profile.htm.
58 South African History Online *Basutoland (Lesotho) gains independence from Britain* available at http://www.sahistory.org.za/pages/africa/african%20independence-history/lesotho.htm, 1–18.
[61] *Lesotho: Late British Protectorate (1913-1966*) SEISA Electoral Institute for Sustainable Democracy. South African History Online (http://www.sahistory.org.za)
[62] Seidman 'Labouring under an Illusion? Lesotho's "sweat-free" Label' (2009) 30(3) *Third World Quarterly* 581–598.

In the late 1970s, well over half of Lesotho's labour force worked in South Africa, sending back remittances that comprised some 70 per cent of Lesotho's rural household income.[63] The migrant labour pattern continued unabated as Sotho workers continued to pour into the mines to sell their labour for cash and firearms. The situation was the same in Bechuanaland.

2.2.5 The colonial administration and labour in Bechuanaland

The dual system in South Africa, which was creating a segregated social class system, was reflected in Bechuanaland laws such as the Native Affairs Proclamation, the African Education Proclamation and the Credit Sales to Natives Proclamation (1932). These and other laws were repealed only in 1964 under the General Law (Removal of Discrimination) Revision Law. The functional interdependence between Bechuanaland and South Africa was driven primarily by economics, but buttressed by legislation and the import of expatriates to run the administrative and regulatory affairs of the territory. By 1949, 495 out of 600 civil servants in the HCTs were South African whites.[64] On the other hand, the Hut Tax Proclamation (1899) in Bechuanaland became the catalyst for externalising black labour to augment the local black South African workforce. The punitive repercussions of the hut tax induced labour to migrate to the farms and mines of South Africa in order to pay the levy imposed on all males to finance the protection of Bechuanaland.

Proclamation No 7 of 1909 subsequently raised the hut tax, deepening the reliance on the externalised sale of labour power. It also compelled collaboration between the chiefs as commission earners or salaried supervisors, the colonial government and the mining industry.[65] Drought, pestilence, taxation and collaboration therefore became instrumental in the structural transformation of the Protectorate into a labour pool. However, it was legislation that sustained the momentum, providing the coercive engine for the implementation of the process.

The physical delimitation of tribal reserves intentionally resulted in the curtailing of traditional authority. The tribal reserves were reduced to 40 per cent of the most unproductive

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[63] Ibid 582.
[64] Taylor (1978) 100 'Mine Labour Recruitment in the Bechuanaland Protectorate' 10 *Botswana Notes and Records*
[65] Colclough & McCarthy (1980) *Political Economy of Botswana: A Study of Growth and Distribution* (1980) 30

parts of the territory. The 1893 Concessions Commission demarcated the rest into freeholds and Crown land.[66] Through these laws, by 1960, out of a population of 526,000, 50,000 Batswana became migrant contract workers in South African mines, 44 per cent of whom were below 16 years of age.[67]

2.2.5.1 The regulatory state in Bechuanaland

The General Law (Cape Statutes) Revision 2 (1959) set out to transfer certain laws of the Cape Colony of Good Hope into Bechuanaland, while repealing other laws. Some of these repealed laws had been declared to be irrelevant, obsolete and unnecessary in the circumstances of the territory and as such should no longer be in force. However, s 3*(d)* also provided that nothing implied the discontinuation of the application of Roman-Dutch common law in the territory. Therefore, by 1959, Roman-Dutch law had been firmly entrenched in the territory for 73 years.

As a result, these laws permeated all facets of civic life. The Native Administration Proclamation (Cap 56) legalised forced labour for public works and appropriated 60 days a year for civic duties.[68] With regard to employment law, the most important law was the Master and Servants Act of 1856[69] of the Cape Colony. Its main object was to provide for the regulation of the rights and duties of masters and servants. Though its definition of the 'employment contract' has not changed to date, the implicit assumption of subordination was, at that time, implied in the concept of 'master' and 'servant'.

It appears therefore that a much longer period and further orientation is needed to rid post-colonial countries of their contradictory attachment to the past when regulating the present and determining the future.

2.2.5.2 Conclusion

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[66] Ibid.
[67] Massey 'A Case of Colonial Collaboration: The Hut Tax and Migrant Labour' (1978) 10 *Botswana Notes and Records* 15. See also 'Adverse Effects of Recruitment' BNA S387/5 National Archives, Gaborone ,Botswana
[68] Sections 25 and 33 of the Laws of Bechuanaland, 1959.
[69] Amended by Act No. 18 of 1856, then No. 28 of 1874, No. 8 of 1925, No. 13 of 1943 and, finally, Cap 47:01, Laws of Bechuanaland 1959, Vol. 1.

Labour legislation, including the above-mentioned Act of 1963, a patchwork from Jamaica, Trinidad (1927) and Tanganyika (Employment Ordinance Cap 366 of 1955), was thus a concoction, usually with a South African origin and flavour. The generality of these employment-related laws was meant to facilitate regulation, control and exploitation. Nevertheless, their pervasive influence in several spheres cannot be ignored. First, it must be accepted that, in the British colonies, forced labour became a dominant defining character of the relationship between the colonial master and the colonised servant. Subsequent changes to fit the mould of the common-law notions of private transactions implying exchange of services for reward within a contractual framework were purely cosmetic.

As has become clear, the hut tax was a subterfuge. It was supposed to provide revenue for the development of the colonies, but this revenue was in fact a pittance. In British Colonial Africa, there was an upsurge in the formation of trade unions and strikes. These unions were established in reaction to blatant socio-economic conditions or privation, deprivation and expropriation. Any demonstrations of political consciousness or maturity had a class character as workers became increasingly informed about socio-economic differentiation and administratively engineered stratifications. The question still remains whether, outside South Africa, most of the colonised countries in the sub-region deserved and still require the maze of labour law regimes with which they are burdened.

The colonial experience in Africa suggests a nexus between labour policy, legislation and the shape and content of the social impact of their implementation. It also suggests a linkage between colonial and post-colonial labour policies and approaches that can only be described as ‘path dependency’. The outcomes in all these periods have been trade disputes and social and political conflict. The laws legalised oppressive workplace practices, which in turn triggered conflicts with repercussions for the wider society. In effect, throughout history, state-initiated interventions using legislation as a tool have been largely ineffectual in resolving workplace disputes. This is due mainly to structural contradictions inherent in the nature of the state, as has become increasingly evident.

The essence of this chapter thus lies in its reliance on history, observations and anecdotal records to look back into the birth process of labour within the broad framework of social development. This is done with the intention of deriving certain linkages to modern social practices. Such linkages, it is hoped, will then assist in finding permanent and better solutions

to recurrent, intractable problems. An overarching caveat is that, given the varying layers of jurisdiction at play in any social structure or set-up, controversies between groups can be more pronounced than harmony because they symbolise differences in human expectations.

CHAPTER THREE

Conceptual Debates in the Context of Labour Law and Disputes

3.1 Introduction

In chapter 2, a case for contextual and historical dimensions to the study was presented on the understanding that much can be unravelled from an examination of the past, in terms of the evolution of ideas and the dynamics of societal events. The chapter sought to undertake a historical survey of labour legislation and potential sources of disputes both in Europe and in Africa, with particular attention being paid to Botswana, Lesotho and Swaziland. The chapter concluded that there is evidence of a linkage between the labour law regimes, the attitudes and ideological orientation of the state, socio-economic realities, and labour disputes.

Chapter 3 provides a basis for the ideas that inform and guide this study in its interdisciplinary approach. It also forms the conceptual platform on which the study is premised as it seeks to confirm certain analytical conclusions. These theoretical issues that are relevant to the study need to be identified and explored. The chapter's aim is thus to ascertain how these discourses inform and guide the study. The chapter is divided into several sections, each providing a summary of a theoretical position and its resulting debates. These sections include theories of labour law, work and employment, changes in labour law conceptualisation, the notions of law in society or law and society, law in context, disputes, industrial relations, labour disputes, the state, and forms of regulation and their impact on functional inter-relationships.

This study asserts that all legal forms including labour law and its institutions are invariably linked to social reality. Furthermore, it appears that mainstream lawyers either do not understand or are simply dismissive of any mention of law that does not yield to the closed and exclusive nature of the legal profession. A survey of these concepts is intended to show that traditional law – which encompasses juridical tenets, common-law precedent, judicial decisions, case law and statutory rules – is not the only analytical tool for understanding society and social behaviour. The study shows further that a preoccupation with offences, defences, sentences and coercion deriving from substantive law is not adequate to explain why labour disputes frequently occur and appear to defy settlement and resolution.

3.2 Theories on labour law and disputes

3.2.1 Introduction

Ehrlich postulated that 'the centre of gravity of legal development therefore from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time.'[70] Therefore, the posited or 'positive', organic law would, in a sense, come into conflict with the 'living law' of a society. Such living law represents society's implicit rules of conduct and not impositions by any rational legal authority. By deduction, the state is an intellectual construct that is subsequently manifested in institutions capable of wielding coercive authority. Its interventions in social arrangements, particularly regarding dispute resolution, without due consultation, can prove irksome. A sociology of law is therefore rooted in society, while law is only a contrived means of regulating society along some arbitrarily determined pattern rather than the determinant of societal formations. This statement may appear to contradict Luhman's position where he elevates and gives prominence to law. As he sees it,

[a]ll collective human life is directly shaped by law. Law is like knowledge, an essential and all pervasive fact of the social condition.[71]

As opposed to Luhman's perceptions, the conclusion by the study above stands and is supported by Habermas, who argues that law ought to be a system or an institution that responds to the popular interests of the ordinary man in his sphere of life. Law ought to facilitate both individual and public autonomy, the enjoyment of which the law must ensure to warrant its legitimisation.[72]

With regard to socio-legal studies, Travers and Banakar see a close affinity between law and society or the study of law-in-society. This is because the sociology of law, seen as the source of socio-legal studies, employs social theories while applying socio-scientific methods to the

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[70] Ehrlich *Fundamental Principles of the Sociology of Law* (1936) translated from original German version (*Grundlegung der Sociologie des Recht* (originally produced in 1912/translated 1936)) 390 http://en.wikipedia.org/wiki/Sociology_of_ law.(15/11/2013)

[71] Luhman *A Sociological Theory of Law* (1985) 1.

[72] Bohman & Rehg 'Jurgen Habermas' in Zalta (ed) *Stanford Encyclopaedia of Philosophy* (2014) available at http//plato.stanford.edu/archives/fall2014/entries/habermas/.

study of law.[73] This is why Cotterell is supposed to have described the sociology of law without reference to sociology in general as 'the systematic, theoretically grounded, empirical study of law as a set of social practices or an aspect of the field of social experience.'[74] Society pre-dates individual existence and therefore it is only natural to be curious about how organised groups and institutions are created to provide social order. To this extent, any legal system ought to be able to ensure institutions for the interpretation and application of meaningful legal rules.

These institutions are embedded in normal life and therefore intrude into the life of the society. These realities are captured within the parameters of the sociology of law also because law could be viewed as bonding society.[75] In the light of the discussions above, the method of this study may not be socio-legal but it is interdisciplinary, using society as its context and examining the role of law and its institutions therein. Essentially, law also evolves over time with new social and economic demands.[76] However, much as this demonstrates an affinity between law and society, and therefore a justification of a sociology of law, the law can still be divided into 'law in the books' and 'law in action'.[77]

Friedman looks at the other side, describing socio-legal studies as 'an inconclusive or incoherent jumble of case studies'.[78] On the other hand, even Banakar and Travers consider socio-legal studies to be a source of innovation.[79] Travers, in particular, clarifies their position when he describes socio-legal studies as a sub-field of social policy, 'mainly concerned with influencing or serving government policy in the provision of legal services.'[80] As a result, the area of socio-legal studies has given up any aspirations it once had to develop general theories about the policy process.[81] Socio-legal studies and research consider the law and the processes of law-making or legal procedure as going beyond the substantive legal text to include socio-political and economic considerations. Thomas raised the discourse bar by saying that a key belief that underpins socio-legal studies is its fully-fledged 'law in context'

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[73] Op. Cit.
[74] Cotterell 'Sociology of Law' in *Encyclopaedia of Law and Society: American and Global Perspectives* (2007) 1413.
[75] Banakar & Travers op cit 8.
[76] Ibid 3.
[77] Pound '*Law in Books and Law in Action'* (1910) 44 *American Law Review* 12–36.
[78] Friedman 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 779.
[79] Banakar & Travers (eds) *Law and Social Theory: Introduction* (2013) 1-15
[80] Travers 'Sociology of Law in Britain*'* (2001) 32 *American Sociologist* 26–40.
[81] Ibid 26.

approach. He states that 'empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context.'[82]

Socio-legal studies are about how ordinary people experience the imposition of legal authority, and deals with the historical purpose of law.[83] Socio-legal studies can be described as dealing with the experiential values of law as an instrument of history and the inter- and multi-disciplinary character of history.[84] If this is the case, then a study that covers the historical interplay of law in discrete societies may be considered socio-legal without the rigidities of socio-legal research methodology. Socio-legal studies are therefore a manifestation of a commitment to 'a distinctly interdisciplinary analysis of law as a social phenomenon',[85] deriving from a basis in institutional legal history.

3.2.2 Law and society and law in context

Travers notes that the Law and Society Association or Movement (LSA) was established after the Second World War through the initiative of sociologists with a vested interest in the study of law. The rationale for the movement was that 'law is a massive vital presence. It is too important to be left to lawyers.'[86] The founders believed that 'the study of law and legal institutions in the social context could be constituted as a scholarly field distinguished by its commitment to interdisciplinary dialogue and multi-disciplinary research methods.'[87]

Travers differentiates between the sociology of law and law and society: the latter does not limit itself theoretically or methodologically to sociology and tries to accommodate insights from all social science disciplines. The original empirical studies of the 1970s and1980s on conflict and dispute resolution are important for this study. Felstiner focused on alternative ways of solving conflicts and, together with Abel and Sarat, developed the idea of a disputes

[82] Thomas 'Curriculum Development in Socio-Legal Studies' (1986) 20 *Law Teacher* 110–112 in Charlesworth 'On Historical Contextualization: Some Critical Socio-Legal Reflections' (2007) 1 *Crimes and Misdemeanours*, 3
[83] Charlesworth 12–13.
[84] Ibid.
[85] Ibid 5.
[86] Travers *Understanding Law and Society* (2009) 1- 224
[87] Ibid.

pyramid and the formula of 'naming, blaming, claiming', which refers to different stages of conflict resolution.[88]

Friedman describes the LSA as a scholarly enterprise that explains or describes legal phenomena in social terms or the relationship between legal and non-legal phenomena.[89] It is also a general commitment to approaching law with a vision and with methods that are external to law but share a commitment to explaining legal phenomena within their social setting.[90] A major thrust of the LSA is that legal systems are basically social objects and that law varies in time and location according to the conditions of the culture of the place. Again, the instrumentality of law is emphasised, together with its human or social context. According to Nelken, 'the goal of relating "law" to "society" by examining social sources and effects of legal rules and ideas and the way law is shaped by and helps shape its historical setting is a central aspect of social theorizing.'[91]

Its aim is not only to de-rigidify law but also to examine it in the context of society and social phenomena as 'a loose, wriggling, changing subject matter, shot through and through with normative ideas. It is a science about something thoroughly unscientific.'[92] The LSA acknowledges that the prime mover of legal change is social demands on its institutions. The legal system, given its exposed position, is forced to respond to demands. Thus, where the impact of law on society elicits demands for change, legal institutions must respond. Therefore, if LSA research ascertains miscarriages of justice, abuses of power or authority, or unlawful acts such as wrongful dismissals, it behoves the legal system to remedy these.

The LSA uses the terms 'law in action' and 'law in context'. Essentially, they all refer to the study of legal institutions, drawing the reference into the core of social, placing the law within the framework of social science life. Law in context points to the many ways that law and its norms and institutions are shaped by the culture, organisational ethos, norms and value systems of a society.[93] In contextualising law, one seeks to address how and to what

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[88] Felstiner et al 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1981) 15 *Law and Society Review* 401.
[89] Friedman 'The Law and Society Movement' (1986) 38(3) *Stanford Law Review* 763–780.
[90] Ibid.
[91] Nelken *Beyond Law in Context: Developing a Sociological Understanding of Law* (2009)http://www.digplanet.com/wiki/Sociology_of_law 5/12
[92] Friedman op cit 766.
[93] Selznick 'Law in Context Revisited' (2003) 30(2) *Journal of Law and Society* 2 177-86

extent law has provided a framework for or facilitated economic development, social change and political evolution, modified the contents of a society's legal system, or provided evidence for a better understanding of that society.[94]

As succinctly put by Parker and Gunningham, '[l]aw cannot be treated as a discrete set of principles without a context.'[95] That said, it must be pointed out that the objective of the study is not to isolate law within a given social context and then proceed to observe it. From the sociological and social points of view, there are so many undercurrents that give direction, character and shape to law. The study acknowledges that, within the context of labour disputes, law plays a significant role through its instrumentality and the intermediary institutions it creates as agents. To this extent, this study is not about law *per se* but law in action within a social context and the effects thereof.

It is precisely because of these realities as enunciated above that Fuller thinks law and society are too interconnected to be differentiated as 'law and society' instead of 'law in society'.[96] It is not clear whether this inclination is in pursuit of the 'fit' debate as alluded to by Nelken, which questions whether law 'fits' into social conditions or whether social conditions are determined by law.[97] Suffice it to say that law must mirror the dynamics and nuances of societal development. For example, how does it assist in mediating workplace disputes through functionally appropriate institutions?

Society and, by extension, social support is important for the legitimisation of law and its fusion with other institutions is the key to its usefulness. In effect, patterns of social change create the justification for law and help dictate its character. Such realities of social life include labour disputes.[98] Selznick notes that even positive law with all its premises, institutions and sustaining culture 'is framed by and implicated in a particular social and historical context.'[99] Although this may be so, history demonstrates that positive (organic) law has been the instrument of much deprivation and repression. With the benefit of hindsight, law has not always been impacted upon by historical contexts, at least not in its

[94] *Ancient Law in Context* (ALC) Seminar and Lecture Series, Centre for Legal History, University of Edinburgh Law School.
[95] Parker & Gunningham *Law in Context* (1994) 1-364
[96] Selznick,(2003) 179
[97] Ibid (2003)
[98] Ibid (2003)178.
[99] Ibid (2003)179.

several attempts to rewrite history instead of addressing contemporary problems, such as those faced in southern Africa within the domain of employment relations.

Therefore there is a need to understand the chosen context such as Botswana, Lesotho and Swaziland. Such an understanding must cover the peculiarities, problems and existing conditions. The rationale is to make law more effective and responsive. This is the principle referred to as fidelity to context.[100] The rationale is that an analysis of the institutions such as those created to deal with labour issues or the prevailing social environment should provide indicators for appropriate rules and procedures. This will facilitate the appreciation of the genuine needs so as to be able to respond to realistic circumstances without compromising the required standards of legality and morality.

In sum, 'law in context' is not intended to take fidelity to context as an absolute. It should be seen as a process that needs to be subjected to and controlled within the confines of universal standards and ideals of freedom, fairness, rationality, justice, empowerment and growth, among others.[101] The goal therefore is to realise relevant and enriching ideals within a given context. For the study, this would mean how to eliminate injustice and acrimony in the workplace and generate industrial peace and amity in Botswana, Lesotho and Swaziland.

3.3 Labour law: Past and present

3.3.1 Introduction

The previous section dealt with variants of legal disciplines and the inter-relationships that have come to underpin studies about the impact of labour law on societies. This section is not intended to be a restatement of labour law in its narrow traditional confines but in its many ramifications, because a preliminary investigation has shown that the concept is increasingly assuming an amorphous shape. The chapter is therefore intended as a discussion of the broad terrain of labour law from different perspectives, thereby covering a wide scope of debates on the subject.

According to Arthurs, labour law has never had a precise meaning. On the one hand, it might be broadly defined as the norms, processes and institutions by which the state regulates or

[100] Selznick *Law in Context: Fidelity to Context* (2002) Repositories.edliborg/csls/fwp/21bidp 21/08/2015
[101] Selznick 'Law in Context Revisited' (2003) Op. Cit. 185.

mediates relations between employers and employees. Such a definition would extend the reach of labour law to include many legal regimes, such as taxation, intellectual property, international trade and social insurance, which shape labour markets and therefore work relations.[102] He goes on to suggest that, while definitions of 'labour law' are likely to vary between countries, legal cultures and historical eras, any definition of labour law will contain the theme of relations between workers and employers.

As this study shows in chapter 2, workplace relations and labour market regulation pre-date any consistent and concise assembly of material subsequently referred to as 'labour law'. Furthermore, Arthurs adds that industrial disputes, trade union affairs, employment contracts, workplace safety, compensation for injuries and maximum hours of work had all become subjects of legislation, judicial pronouncements and legal texts by the end of the nineteenth century.[103] He sees labour law in its generality as a derivative of all legal disciplines captured in the figure below.

3.3.2 Sources of law and labour law application

SOURCES OF LAW	LABOUR LAW APPLICATION
Special labour laws	
Collective labour legislation	Relations between unions, employers and workers
Employment standards legislation	Floor of rights, negotiations over floor
Occupational health and safety, workers' compensation legislation	Reduces industrial accidents and illnesses, provides compensation
Social legislation	Unemployment, illness, retirement, training
Fundamental law	
Human rights legislation	Discrimination, harassment
Constitution; Charter of Rights and Freedoms	Regulatory jurisdiction, equality, mobility, access to collective bargaining, strikes and picketing
General law	

[102] Arthurs 'Labour Law as the Law of Economic Subordination and Resistance: A Thought Experiment' Labour Research Network Inaugural Conference, June 2013.
[103] Ibid.

Criminal law	Picketing
Tort law	Picketing, strikes, boycotts, workplace injury
Contract law	Employment contract, internal union affairs
Property law	Picketing, union solicitation
Trust law	Pension and benefit funds
Administrative law	Judicial review of labour tribunals
Specific statutory regimes	
Competition law	Employer associations
Corporate law	Employee voice, management responsibilities
Intellectual property law	Non-competition, ownership of inventions
Immigration law	Migrant workers
Taxation law	Self-employment
Trade law	Goods excluded if child or convict labour
International law	
UN charters of human and social rights	Freedom of association and equality
ILO conventions	Directly bind or influence interpretation of domestic labour law
NAALC, EU Social chapter	Labour dimension of economic integration
Non-state law	
Transnational law	Codes of conduct
Government procurement policies	Minimum standards, employment equity
Custom or usage	Quotidian rules of workplace

[Source: Arthurs 'Labour Law as the Law of Economic Subordination and Resistance: A Thought Experiment' Labour Law Research Network, Inaugural Conference, June 2013]

Others may define labour law as including components such as 'atypical, casual, temporary or precarious work arrangements'.[104] There are also the 'target', transient employees who seek work to satisfy a specific need. Others are excluded completely from the protective and regulatory embrace of their labour law regimes. Therefore, the best functional approach is neither 'complete universalism [n]or extreme selectivity'.[105] In other words, labour law can

[104] Davidov '*Setting Labour Law's Coverage: Between Universalism and Selectivity'* Labour Law Research Network Inaugural Conference (2013) 5
[105] Ibid 8.

be captured when work-related rights and regulations apply only to 'employees' as defined but then other legal rights should be open to all claimants of whatever rights and largesse the state may provide.[106]

For example, from 1992, the Labour Code Order of Lesotho conferred the status of employee on anyone working under a contract with an employer in any capacity, whether in a rural or urban area, including domestic servants.[107] In Swaziland, the employment contract is defined as covering anyone engaged in a contract of service, apprenticeship or training. An employee is a person who works for pay or remuneration under a contract of service or under any other arrangement that involves control. This also means a sustained dependence on the employer for the provision of work. In this regard 'control' can imply the inclusion or not of such protection and benefits decreed by law or agreed upon outside the framework of the law.[108] This suggests a differentiated status classification between the one who commands and the one who obeys.

As this study intends to show, the preambles, for example, offer lofty ideals but empirical evidence demonstrates an utter disregard for the statutory provisions. Domestic servants have only recently been brought within the ambit of the laws, while workers in agricultural enterprises do not include all categories of farm workers.

Botswana also has an Employment Act which stipulates that an employee is one who entered into a contract of employment for the hire of his or her labour and specifically excludes certain groups of employees, subject to other legislative regimes.[109] It also includes the proviso that the employee must be subject to control and direction as to what service to provide. In the context of labour law, therefore, Botswana, Lesotho, and Swaziland may be described as coming from a mixed socio-legal background that has produced a similarity of legal regimes. Constitutional provisions underpin fundamental rights and obligations. Codes of practice seek to humanise and fill the gaps arising from statutory provisions.

In these countries, responsibility for labour dispute adjudication is allocated to the labour bureaucratic structures. Industrial Courts have been established, clothed in most instances

[106] Ibid 9.
[107] Part 1 of the Interpretation Labour Code Order 1992.
[108] Swaziland Employment Act 2001
[109] Employment Act [Cap 47:01] Interpretation.

with exclusive jurisdiction over trade disputes and functioning as courts of law and equity. The Charter of Fundamental Social Rights in the Southern African Development Community (SADC) was adopted in 2001 and signed by the Heads of Member States in 2003. It is hoped that, once domesticated, it will complete the existing labour law framework. These on-going interventions form a critical part of this study because there is evidence of increasing external influence, as a result of which the domestication of international minimum labour standards appears to be imminent, if not already occurring.

In comparative terms, Cabrelli seems to summarise the essence of labour law as distilled in the works of the foremost proponents. He begins with Lord Wedderburn.[110] In defining labour law, Wedderburn considers the following as components. First, there must be an employment relationship between an employee and employer. Within the environment of work, employees will be socialised into collective decision-making. They would then want the employer to endorse this as binding on all, hence the collective bargaining and agreement with statutory implications. In addition, protective and regulatory intervention exists to mediate the relationship. Freedom of association, recognition agreements, the inherent right to industrial action under given conditions and the employers' prerogative to resort to lock-outs also help to define the scope of labour law.

Cabrelli proceeds to say that, according to Lord Millet, it is generally recognised today that 'work is one of the defining features of people's lives'.[111] Relying on several other sources, Cabrelli concludes that one possible way of describing a contract of employment in modern terms is as a relational contract. Further, since the common law is in a state of continuous judicial development so as to reflect the changing perceptions of the community, contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents.[112] Assuming these conclusions are valid, then the concept and scope of labour law needs to be revisited.

3.4 Reconceptualising labour law

[110] Wedderburn *The Worker and the Law: Text and Materials* 3 ed (1986) 13; see Cabrelli *Employment Law in Context: Text and Materials* (2014) 5-6.
[111] Langille *'Labour Law's Back Pages'* in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 14–17; Cabrelli op cit 42.
[112] Cabrelli ibid.

Conflicting tenets appear to characterise the field of labour law. These include granting individual autonomy to all those active 'on the labour market' to interact and freely make contracts, and 'facilitating the roles of these actors and their actions by legal means, thus establishing order in their ways of interacting and contracting; and offering protection to workers, compensating by legal means for substantial inequalities in their bargaining position towards employers'.[113] As noted elsewhere, 'classical' labour law was supposed to realise its aims by creating a relatively autonomous domain of law, deriving mainly from substantive regulation of the 'normal' contract of employment at the level of the nation state. These regulations would then be legitimised by the political need of protection of workers.[114]

3.4.1 Substantive issues

This section follows from the need to answer the concerns above and, by so doing, to substantiate or rebut certain assumptions about labour law. Primarily, labour legislation is deemed to intrude in the domain of the employment relationship by seeking to regulate its dynamics. In the contemporary context, therefore, the 'concern with the correction of inequalities in bargaining power via the prophylactic of labour law or the social practice of collective bargaining has lost much of its force.'[115] Some proponents have provided various justifications for a re-visit of the traditional notions of common law. Ultimately these, in practice, would affect the scope of both substantive law and other legal rules that are brought to bear on the environment of work and perhaps temper and mediate the current volatility of labour relations in the countries examined in this study.

The employment contract is the bane of the employment relationship. Contemporary employment law uses it as a basis for determining who is an employee. However, this derives from the general principles of contract, underpinned by the notion of the mutuality of obligations. This also rests on an assumption of choice, control and risk: choice because there is an assumption of free will; control in terms of the judicial assumption of the employer's prerogative; and risk because the transaction carries liabilities and protection.[116] Empirically, these assumptions are wrong and should not continue to form the basis of workplace law. In

[113] *'Repositioning Labour Law'* Research Program of the Hugo Sinzheimer Institute (2013–2016).
[114] Ibid.
[115] Davies & Freedland (eds) *Khan-Freund's Labour and the Law* (1983) 14–18.
[116] Deakin '*Interpreting the Employment Contract: Judges, Employers, Workers'* (2004) 20 *International Journal of Comparative Law and Industrial Relations* 2201–2226.

effect, these traditional notions that inform judicial decisions are not employed to benefit the worker, but rather help to perpetuate the myth of freedom of contract.

Ipso facto, the concept of a free market premised on the commodification of the worker ought to be jettisoned as a defining attribute of the employment relationship. Since it is inherently integral to the worker, labour or the reproduction of the worker's productive capacity cannot be commodified without the person.[117] While accepting the need to work within a framework of doctrinal and contractual analysis of the juridical sphere of individual and personal work relations, the question posed by Freedland and Kountouris is whether the institutionalised employment contract serves the purpose of conferring status or a functional relationship.[118]

If one may paraphrase Mitchells, the concern should arise from the empirical fact that there have been changes resulting in an increase in new forms of a-contractual, atypical and non-standard forms of employment, a problem that the recasting of the theory of the labour market can solve. Davidov, on the other hand, is of the opinion that these do not warrant a new paradigmatic shift but an adaptation of labour law to meet these challenges.[119] In the context of this study, it is not a re-conceptualisation that is called for, but a candid assessment of the inadequacies of labour law as currently understood and implemented. The ongoing institutionalisation of the inequality of bargaining power implies that current labour law has been unable to correct this. Doing this would have resulted in the regulation of labour market failures, the achievement of efficient labour markets and the realisation of social justice through the rejection of the commodification of labour.[120]

That said, it must not be forgotten that–

> the most important shift in the discipline has been away from collective bargaining towards individualization, whether in the form of the contract of employment, human rights and anti-discrimination law, or employment standards.... In official accounts of labour law, redistribution and protection have given way to competition and flexibility. Forms of work outside of the standard employment relationship have proliferated and the scope of collective bargaining has contracted in most developed economies. These empirical changes have resulted

[117] Clarke '*Individual and Collective Regulation of Labour Relations'* Centre for Comparative Labour Studies, University of Warwick-Beijing Labour Conference 2004.
[118] Freedland & Kountouris '*Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe'* (2008) 37(1) *Industrial Law Journal* 49–74.
[119] Ibid 5.
[120] Cabrelli op cit 13.

> in a conceptual and normative crisis in labour law, and a concomitant loss of prestige. Labour law's crisis both reflects and is part of a broader conceptual and normative shift within society and the academy.[121]

There is the perception that labour law, particularly in terms of the judicial rules and standards review in areas such as rationality, reasonableness and proportionality, undermines employer prerogative and by so doing impedes business efficiency. Thus what is referred to as 'labour law red tape' must give way to deregulation so as to remove the 'sclerotic' effects of labour law on economic development and to allow the system to self-adjust where labour markets appear to fail.[122] This moves the arguments to the arena of globalisation and trans-territorial labour law.

3.4.2 Globalisation and trans-territorialism in the context of labour law

Globalisation and the attendant economic restructuring have led to the devaluation of traditional labour law. The by-product is the spawning of an internationalised 'new' economy involving 'networked, boundary-less, even virtual organizations' that employ floating professionals on project-specific terms.[123] Further, globalisation has also led to an increase in precarious, dependent and socially marginalised work, where workers are employed as casuals or on specific contracts. As a result, they acquire few transferable and marketable skills, work unsociable hours in an environment bereft of collective association and unions, and where the legislative intervention of the state is considered as interference and intrusion so that the presence of the state becomes increasingly weakened.[124] The increasing evidence of the absence of collective bargaining law and protective legislation leads to concerns about the efficacy of labour law.

The precarious class emerges without occupational citizenship rights or any of the normal safety rules at work.[125] Industrial citizenship rights and protection cover labour market conditions, employment, occupational safety, work and environment work competence,

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[121] Fudge 'Labour as a Fictive Commodity in Davidov & Langille *The Idea of Labour Law* (2011), see Cabrelli op cit 124.
[122] Davidov & Langille (2006) *Boundaries and Fronts of Labour Law* 20
[123] Frazer '*Reconceiving Labour Law: The Labour Market Regulation Project'* (2008) 3.
[124] Ibid 2.
[125] Fleming & Seborg 'The Debate on Globalization and International Revitalization of Labour: A Critical Review' (2014) 4 Nordic Journal of Working Life Studies 54-55

income and collective representation.[126] 'The precariat is formed by global competition, inequality and re-commodification in a new global class structure as one of the seven classes. The seven classes include the 'global elite, the salariat (civil servants and private high-paid employees), the proficians (technicians and professionals), the core workers (a withering working class), the precariat, the unemployed and the detached (modern 'lumpen proletariat').'[127] Globalisation has affected even new theoretical positions and debates on labour and created doubts in the arena of international labour studies, thus creating an amalgam of unworkable paradigms.

3.4.3 The way forward: Paradigmatic shifts or pragmatic adaptation

In reaction to the labour problem arising with the advent of globalisation, it has been suggested that transnational labour regulation (TLR) could be the answer. Kolben defines TLR as 'the field of law that concerns the regulation of work in the transnational sphere'.[128] It is expansive in scope and constituted by a number of regulatory and academic fields that impact transnational work, including labour law. He states that, because of TLR's heterogeneous roots of regulatory and political theory, it is often described as a spider's web or a mosaic.[129] Its major component is governance. He adds further that governance is a theoretical model applied to problems of global labour regulation but primarily referring to a body of regulatory and social science scholarship that describes the uncoupling and decentralising of regulatory authority and functions from the state and government to other regulatory layers, which are often subordinate.

In essence, the main thrust of the TLR agenda appears to be to cast the state as incapable of regulating, and thus unable to monopolise, law and law-making. Teubner notes that this situation gives birth to legal pluralism or multi-layered law-making and a resultant reflexive legislative responsibility. In an adroit manner, the state is neutralised and trans-territorial corporations can now make their own rules.[130] In a competitive world, this is a recipe for anarchy. Who then regulates the regulator, particularly where the justification is that

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[126] Standing (2011) *The Precariat: The New Dangerous Class* (2011) 10
[127] Ibid.
[128] Kolben 'Theoretical Enquiries in Law, Mapping the Hard Law and Soft Law Terrain: Labour Rights and Environmental Protection Art 2' (2011) 12(2) *Transnational Labour Regulation and the Limits of Governance 402*.
[129] Ibid 404.
[130] Ibid.

developing states have weak and deficient labour law systems, lack accountable governance, and literally require dismantling and restructuring to suit the proponents of globalisation?
A clearer view emerges from Kolben's exploratory and analytical thesis. The grand aim is the transformation of the regulatory state and the limitation of its capacity by devolving regulatory authority to multinational corporations (MNCs).[131] He states that developing countries should not be analysed in the same way as developed ones are analysed. While there is over-juridification and unresponsive regulation in the West, in the developing countries the basic problems are the failure of the rule of law, under-developed regulatory regimes, and a lack of capacity to generate and enforce rules and norms. Furthermore, labour institutions are often under-resourced, corrupt and lethargic.[132] A universal, common law for all states, premised on Watson-style translocation and transplantation in different contexts, would simply not work, given the differences.[133]

Going back to Davidov, the concerns about workers' rights as human rights, labour peace and stability have come to underpin and indeed qualify what is considered to be the emerging re-conceptualisation of labour law.[134] This is the context of what Mantouvalou describes as strategies of determination, being the 'positivist' approach, where labour rights are incorporated into international treaties and conventions or domesticated by way of ratification of a floor of fundamental rights, as in the SADC Charter on Fundamental Social Rights and the core conventions of the ILO.[135] The other instrumental approach is determining 'whether labour rights really are promoted within the framework of human rights.'[136]

3.4.4 The employment contract, the worker and employment relations law

The employment contract, whether considered outside the confines of the concept of economic superiority and subordination or not, will always exhibit the linkage factor of resistance.[137]

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[131] Kolben 'Towards an Integrative Theory of Transnational Labor Regulation' *Regulations for Decent Work Conference* ILO Conference Paper, (2009).14
[132] Kolben op cit (2011) 427.
[133] Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) *Modern Law Review*, 61
[134] Collins *Theories of Rights as Justifications for Labour Law* (2011)137-146
[135] Mantouvalou 'Are Labour Rights Human Rights?' (2012) *European Labour Law Journal* 1-7
[136] Ibid 7.
[137] Arthurs 'Labour Law as the Law of Economic Subordination and Resistance: A Thought Experiment' Labour Law Research Network Inaugural Conference, June 2013.

The contract of service then becomes the basis for the antithetical relationship between a group that appropriates and utilises labour and a group that offers the service under conditions of subordination. However, subordination per se cannot describe the relationship, because in hierarchically structured organisations there is necessarily super-ordination and subordination. This locates the relationship within the ambit of an unequal exchange with the attendant unequal economic returns and thus economic dependence. This can be structurally contrived in situations where macro-level economic policy and political authority intervene.

The labour contract is said to be the cornerstone on which labour law stands,[138] but it would appear that although the contract marks the starting point of labour law, it is only a constituent part. Kahn-Freund had described the contract as a figment of the legal mind. Developments over the years have shown that it is both a historical inheritance and a consciously institutionalised core element of the employment relationship. In Kahn-Freund's view, the main object of labour law is to be a countervailing force to counter the inequality of bargaining power that is necessarily inherent in the employment relationship.[139] Again, contemporary observations of the law at work suggest that labour law has failed in this task because the employment contract is intrinsically related to production, not the equality nor indispensability of labour power.

Labour power in this context means the capacity for labour, competencies or skills, knowledge and physical attributes. Labour law is deemed to have been built on two complementary pillars: the autonomy of collective bargaining and state intervention.[140] In reality, while collective bargaining is a process, both internal organisational rules and legislation are facts. Submission and subordination therefore occur in the course of actualisation of labour power. This process is also referred to as of the economics of production or the extension of capital. This process of economic production is then bolstered by the assumed privacy of the employment contract.

In view of all these developments, Kahn-Freund's work resulted in a move away from legal categorisation into contract, tort and statutory prescriptions as the basis for labour law. The

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[138] Goldin 'Some Defining Components of a Labour Law Influx' Labour Law Research Network Inaugural Conference, June 2013.
[139] Davies & Freedland *Kahn-Freund's Labour and the Law* (1983) 18.
[140] Coutu 'Labour Law, Legal Pluralism and State Sovereignty' (2006–2007) 13(2) *Canadian Labour and Employment Law Journal* 169–185.

concept of labour law through the analysis of collective bargaining, trade unions and disputes within a regulatory framework was introduced. Labour law thus became affiliated to workplace relations, industrial relations and collective bargaining. What it failed to do was to reconstruct the work contract, contextualise it and allocate a specific definition to it outside both common law and economics.

It is noteworthy that, given the historical context of labour law, a South African viewpoint is that while contemporary labour law scholars recognise that the role of collective bargaining is diminishing and new institutions will have to emerge, the broad family of labour law theorists and proponents agree that labour law's normative function must be about addressing the disproportionate access to economic power between capital and labour.[141] Broembsen notes that Hepple (who is also South African) reminded us that 'the prime purpose of labour law is still to establish a countervailing power in the labour market which assures equality of position between employers and the collective organizations of workers.'[142] Much as it is generally agreed that labour should not be commodified, definitions of labour law still identify the private market transaction in contract as the basis of the employment relationship and proceed to regard labour markets just like any other markets, irrespective of the human factor as opposed to inanimate products. In realising the present difficulty in attaining these lofty ideals, Broembsen accepts that, by definition, labour law is inherently concerned with protecting human dignity.

Broembsen then borrows from Standing's distinction between work and labour, where he describes work as an activity that encompasses 'creative, conceptual and analytic thinking and use of manual aptitudes'. Standing further says that work is 'rounded activity combining creative, conceptual and analytical thinking and use of manual aptitudes'.[143]

This primary human activity is reflective and contemplative because, according to Cato, in reference to man in action, '[n]ever is he more active than when he does nothing'.[144] Standing described labour as 'arduous – perhaps alienated work – and epistemologically it conveys a sense of pain – animal *laborans*. We may define labour as activity done under some duress,

[141] Von Broembsen 'A New "Constituting Narrative" for Labour Law: A Critique of Development and Making a Case for Fraser's Conception of Social Justice' Labour Law Research Network Inaugural Conference, June 2013.
[142] Ibid.
[143] Standing *Global Labour Flexibility: Seeking Distributive Justice* (1999) 3.
[144] Ibid.

and some form of control by others or by institutions or by technology, or more likely by a combination of all three.'[145]

Put otherwise, work involves the individual in interaction with fellow persons and nature and is therefore an activity or a series of linked actions, using mental activity, physical activity or both to achieve a predetermined objective. 'Labour', on the other hand, derived from the Latin word *laborem,* means toil or arduous undertaking. In labour is implied onerous work, usually manual agricultural work. The word 'labour' in Greek is *ponos* or pain, while the French word *travailleur* means a person subject to torture with a nasty instrument, through constant use. Labour is thus activity pursued under constraints.

Unmediated labour markets, where contract remains a dominant expression of supply and demand, therefore place labourers in a vulnerable position, with concomitant risks to their human dignity. Von Broembsen observes that, as a bulwark against capital's proclivity to commodify labour, labour law's 'project' has been to provide both a procedural framework for the bargaining process and substantive minimum protections for employees. It is clear that all the observations and conclusions of the foremost labour theorists point to a dysfunctional disjuncture that is traceable to both the juridical and judicial acknowledgement of the common-law free-market force of contract.

It may be assumed that labour law's rationale is based on labour's unequal bargaining power. Also, the work environment may be faced with myriad challenges from the human interactional perspective. For this study, the position is that labour law has to be about labour and labourers, irrespective of other perceptions, otherwise it ceases to be of relevance. Work, as it is understood, is the application of labour power emanating from the worker. Work was not intended to be the process engineered to extract surplus value through greater productive effort. Embedded in the work relations are issues which have no defining legal concept. This does not mean they do not exist.

The notion of a floor of rights defining workplace relationships exists. Given the discrepancies between municipal laws and ILO conventions, labour law should demonstrate a concern for how these basic rights are translated into statutory provisions, bearing in mind

[145] Ibid 4.

Teubner's warning. He cautioned that legal institutions may not be easily transferable unless one prepares for a mutation that is the result of both the donor and the recipient adapting their contexts. As such, systemic transplants are not like the transfer of a part of one machine into another.[146] This study considers the adoption of the ILO core conventions and the spirit that infuses them as an adequate substitute for any selective redefinition of the contract, which runs the risk of over-definition.

Imposing subjective legal rules without sensitivity to need and relevance results in either resistance or instrumental compliance. It is not surprising if labour law that seeks to augment the powerful position of the employer becomes the cause of labour disputes. A key to dissipating labour disputes lies in equalising the contributory potential of all players, not perpetrating the notion of a contract for service between a master and a servant in the face of an avowed mutuality of service.

In the context of Botswana, Lesotho and Swaziland the observations above all have some validity, which this study intends to test. The study asserts that, by implication, the crisis of labour law is caused partly by its apparent inability to grasp the complex character of the social challenges that it confronts in order to solve them.[147] Law, particularly labour law, requires an appreciation of the interdisciplinary nature of its composition. The issues involved deal more with social effects than abstract rules. To this extent, therefore, while the law makes greater social sense in given contexts, the philosophy informing it is equally important. To grasp this, one cannot ignore the roots of law and the lessons and directions such origins offer. In effect, labour law cannot exist without law.

It is the contention of this study that the connection between history, law and social development, and the interrelatedness of the legal rules pertaining to the labour and employment relations of the countries being studied need to be identified. These have at certain stages in their social development experienced the same or similar forms of economic exchanges, including political and other forms of administration. To understand these phenomena is not a question of the uniqueness or exclusivity of legal expertise but an acknowledgement of the contribution of law.

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[146] Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) *Modern Law Review* 11-32

[147] Kemenes in Laszlo Nagy (ed) (1998) *1st European Regional Congress of Labour Law and Social Security*. p.16

Rules of law derive from facts of human nature and history.[148] Rules derive from perceived public authority rather than social custom, which may derive from personal authority, whims or caprice. In an ordered society, there are laws and institutions for seeking redress and imposing penalties. Law, therefore, is a matter of fact for the conduct of social life and, by extension, labour law is for the conduct of work life. To reiterate, according to Teubner, subsystems within each society make legal rules precisely because the dominant state as the major source of regulatory law is unable to centrally implement its legal rules.[149] Ultimately it creates institutions of administrative authority capable of sub-regulating. Such over-bureaucratisation leads to what Teubner refers to as 'juridification'.[150]

Juridification is also perceived as the result of 'motorised legislation'. By this, Smith means–

> the sheer volume of laws, their complexity and inter-connection and their constantly changing nature make the application and knowledge of them, even by specialist lawyers, doubtful. Laws and subsidiary legislation cover kilometres of shelf space and the operation of law becomes ever costlier.[151]

Thus, a labour or industrial relations system would normally experience regulatory intervention by the state and its institutions, and the influence of the constitution, codes, collective bargaining agreements, structured rules and regulations, custom and practices encapsulated in both the individual and collective labour law regimes.

Practically, the proliferation of institutions or structures all aimed at dispute resolution results not only in petty centres of power but also in a replication of rules, procedures and the normalisation of ad hoc measures. The state, by intervening in labour relations both as an arbiter and employer, then becomes synonymous with juridification. If indeed each subsystem creates legal order, then the phenomenon of legal pluralism results.[152] If these subsystems are complementary, Teubner asks the following question: at what point do

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[148] Ibid.
[149] Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239–285.
[150] Ibid.
[151] Hirst 'Statism, Pluralism and Social Control' (2000) 40(2) *British Journal of Criminology* 279–295.
[152] Coutu 'Labour Law, Legal Pluralism and State Sovereignty' (2006–2007) 13(2) *Canadian Employment and Labour Law Journal* 169–185.

independent collective bargaining agreements or 'group autonomy'[153] or the autonomy of workers clash with the legal rules of the employer?

The rules of law are not rules of morality even if their logic and authority emanates from collectively experienced norms and morals. For example, the concept of the vicarious responsibility of an employer for an employee's actions is not rooted in moral equity but in the legal fact of the instrumentality of supervision and subordination arising under the common-law employment relationship. This institutional evolution within the sphere of the state produces internal differentiation with co-existence. These institutions operate within a given order of social power which in itself is dynamic. In effect, labour law and industrial relations are subject to the vagaries of the wider socio-economic and political variables.[154]

Work relations could be better studied through examination and evaluation of the form, function and purpose of a given set of rules and how these are applied. As techniques for regulating social power, they are, however, not enough to explain the phenomena associated with labour: its psychological, political, economic, spiritual and cultural permutations. An understanding of the law would also include its interdisciplinary linkages with human resources management, trade union history, labour economics and the sociology of labour.[155] Labour law is not and should not be merely a collection of precepts and rules devoid of an environmental context reflecting different socio-economic objectives.

In defining labour law, therefore, this study is mindful of other usages. The concept may encompass industrial safety, employment, and industrial relations law.[156] Labour law should therefore be seen holistically as involving discipline, statutes (both regulatory and auxiliary), standards and collective bargaining. Its sources are the common law, social legislation, codes of practice, public law, administrative practices and government institutions, the state, constitutional provisions and the courts. In the search for a revitalisation of labour law, it should be remembered that, as opposed to the international labour standards of the ILO, any ultimate preference for a global labour law can only be premised on a particular, contextual understanding.

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[153] Ibid.
[154] Rogowski *Reflexive Labour Law in the World Society* (2013)1-13
[155] Veneziani 1st European Regional Congress of Labour Law & Social Security (ed) Lazlo Nagy Akademia Kiado, Budapest 144.
[156] Smith & Wood *Industrial Law* (2015) 888.

This understanding is that a concept of a global labour law emanates from a regime that is a product of the co-evolutionary internal differentiation of world law. It is the change in labour law by transforming institutions, not by changing substantive rules. Its driving force, constitutionalism in this context, implies corporate responsibility and how the codes of conduct of multi-national corporations are implemented. It is therefore the indirect globalisation of labour law.[157] The role that labour plays in all these debates is the next concern.

3.4.5 Labour or employment law?

The first issue is whether law regulates production or the relationship between the owner of the reproducible labour power and the employer. Either way, employment relations or employment is a more apt description of such law or legal regime. Therefore, this discussion will, following Standing, use the words 'labourer' or 'worker' to signify the employee or worker, and the term 'employment law' in the place of labour law. For now, labour law may still be overshadowed by the common law, particularly in the courts of Botswana and Swaziland, where it enjoys an understandably pervasive continuity. Therefore, work-related judicial decisions still follow precedent and procedure, and the employer prerogative and archetypal models of the master–servant relationship also prevail. These claim the universality of a subjective determination of the doctrine of reciprocity.

It is argued further that the mutuality of obligations also enables–

> the employee to trade-off subordination or acceptance of the employer's right to give instructions and to organise the carrying out of the work, in return for certain protections; at a basic level, a regular wage which a self-employed person would not expect to receive, at a more extended level, the full set of income and job security rights which go with continuous service under the current provision of employment protection legislation.[158]

[157] Rogowski op. cit. (2013) 1-267
[158] Ibid 208.

This argument is indicative of the current debates on the sanctity of the contract, the judicial tendency to uphold 'non-mutuality' clauses, and the purposive assault on collective agreements and unionisation among the multi-faceted problems of labour law.[159]

Mitchell asserts that, functionally, labour law would mean the law of the individual worker, the job seeker, the unemployed and the marginalised.[160] Should labour law be considered in terms of purpose, it would mean a social framework within which workers negotiate their rights and interest with employers through collective organisations.[161] This entails collective bargaining structures, collective representative organisations, and implicitly the right to industrial action as a countervailing force to the employers' power and unilateral right of termination. This accepts a necessary socialisation of the actors in the production process.

In view of this, the labour law regimes in Botswana, Lesotho and Swaziland initially reflected only the preoccupation of those anxious to regulate the extraction of raw materials and the creation of labour reservoirs. Work has been defined as activity undertaken with our hands that gives objectivity to the world, or as effort aimed at redefining people in their relationship to nature.[162] But work as full-time activity is new in relation to work as a necessary social function. Paid work or occupational work locates the person within one form of market or the other but also carries certain social perceptions of status. This is why an ex-officer or functionary would choose to be referred to as a retired general or permanent secretary as a claim to social status. According to Grint, 'the language and discourse of work are symbolic representations through which meanings and social interests are constructed, mediated and deployed.'[163]

Thus, when the state imposes the definitive term 'contract' on the employment relationship and confers the status of 'economically active' on those it perceives as contributing to fiscal and economic revenue, work assumes both political and economic connotations. Employment has therefore become the institution within which the social process of work occurs. As a result, it shapes identity as much as it produces goods and services.[164] The *proletarius* in

[159] Ibid
[160] Mitchell *Redefining Labour Law: New Perspectives on Teaching and Research* (1995) xiv.
[161] Ibid xi.
[162] Grint *The Sociology of Work: An Introduction* (1994) 8.
[163] Ibid 9.
[164] Gorz *Critique of Economic Reason* (1989) 54.

Roman times was the servant of the state, a person without property, coming from the lowest class of the community, without capital, a serf or wage worker.[165]

In such an environment, employment relations create a scenario in which the employer affects the employee in a manner contrary to the employee's interests. Fox quotes Gouldner on the relationship between work relations and the need for law:

> 'A technologically advanced civilization reduces and standardizes the skills required for wanted performances: it simplifies and mechanizes many tasks. It is therefore not as dependant on the rhetoric of morality or the mobilization of moral sentiment to ensure desired performances. Thus, within the technologically advanced sectors of society, individuals are less likely to be required to possess moral qualities and to be treated as moral actors …. For men are becoming more interchangeable, more replaceable, and removable at lower costs …. [166]In other words, men are less likely to experience themselves as potent and in control of their own destinies as bureaucracy, technocracy, and science become increasingly autonomous and powerful forces by which men feel entrapped. Men's capacity and need to see themselves as moral actors are threatened. Many, therefore, will be disposed either to reassert their potency per se, aggressively or violently and without regard to the moral character of such affirmation, or to relinquish the entire assumption that they are moral actors and capable of moral action'.[167]

To achieve this end, Marx proposed that the key to the organisation of work lies in the broader society in which it is embedded.[168] The social structure itself is determined by prevailing relations of production reducible to the nature and control over property rights relative to the labour process and relations of production.[169] For Marx, the critical locus of alienation comes to be situated in the workplace. The decisive form of alienation is not that of man but the worker's alienation from objects that he or she produces and from the means of production with which he or she produces them.

This alienation, Marx came to hold, was a result of property institutions essential to capitalism. These derive from the division of labour in which some capitalists own and direct the means of production and purchase the labour power of others, such as the proletariat, who

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[165] Grint op cit 16.
[166] Gouldner *The Two Marxisms* (1980) 177-198.
[167] Ibid.
[168] Marx *Capital* (1987) 1 163.
[169] Ibid.

are subject to their domination. By reason of their ownership of the means of production, the capitalist can direct their use and also own the products they produce.[170] This nexus is essentially antagonistic. Such a relational phenomenon cannot purport to underpin industrial democracy as it already functions as the prime mover for the prevailing, institutionalised inequalities.

The worker, as the owner of labour power, is socialised into an organised production chain Therefore, the employee becomes a victim of the scientific process of the domination of nature. Such domination is not exercised by the labourer, but rather he or she is dominated in the capitalist process of dominating nature. This more often than not results in a form of division of labour that translates into the deskilling of the worker. This labour process also engenders an ideologically driven objective socialisation process for the attainment of specific goals.[171] The presumption that the end justifies the means is fallacious, in that a worker who perceives him- or herself as exploited has nothing to celebrate in the spoils of economic inequality, hence the development of disputes.

Labour disputes are thus the result of a relational permanence that is not easily resolved. From the foregoing, the study makes certain deductive assertions. The first is that reward systems that accompany the division of and reproduction of labour do not represent the true value of individualised labour in real terms. They are artificial impositions or the results of valorisation. This is a process that places more pressure on production capacity, dictating more quantitative socialisation and a preference for numbers. This may at times be at the expense of skills and specialisation and may also require technological re-skilling.

This can be read as a reason for the modern-day clamour for the internationalisation of labour law and labour markets under the guise of globalisation.[172] The net result is that with less skill comes lesser marketability of the worker, weak negotiating capacity, and vulnerability to employer machinations. Economic returns or rewards are naturally therefore a factor of labour disputes. The employment contract, being one of service, defines the economic relationship of domination and subordination based on an imbalance in bargaining power,

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[170] Gouldner supra.
[171] Gramsci *Selections from the Prison Notebooks of Antonio Gramsci* edited by Hoare & Nowell Smith (1971) 201.
[172] Adler & Borys 'Two Types of Bureaucracy: Enabling and Coercive' (1996) 41(1) *Administrative Science Service Quarterly* 61–89.

and therefore a perennial need for accumulation of power and leverage. Labour theory of value then attempts a more pragmatic definition of the relationship between labour as a function of the capitalist process of accumulation.[173]

However, there is one very important difference between labour-power and other commodities, in that labour-power is embodied in human beings who can think, act and struggle to get the best price for what they are selling. Otherwise, its value is fixed in the same way as that of other commodities. The worker is capable of quantifying the amount of socially necessary labour spent on creating it and recreating it. The labour spent on creating a person's labour power is that spent on producing the food, clothing, shelter and the other things needed to keep him or her in a fit state to work. Thus the value of an unskilled person's labour-power can be measured in terms of the ability to keep him and his family alive. This is the source of the living wage. To increase access to higher economic returns while making profit for the employer calls for a different tactical approach. He can combat this inequality only by attaining associational rights as a member of a trade union.

For this study, it is clear that social arrangements are utilised to ensure the stable continuation of the economic imbalance between the labourer and the master. The net result is the employer's desire to maximise control, tempered only by a fear of worker revolt. The worker's desire for equality of power or at least some respect from the employer is tempered by fear of interdiction and dismissal. It is thus logical to conclude here that employment relations deals with the realities of workplace antagonism, measures of containment and tactical concessions, rather than theoretical postulations and assumptions. This is addressed in the next section.

3.5 The theory of labour disputes and conflicts

In the previous section, an attempt was made not only to define labour in terms of work and the worker, but also to posit the worker as a victim in the socialisation necessary for the extraction of profit. In this section the origins of disputes will be identified and they will be located within the context of employment relations. This section therefore attempts an

[173] Marx *Zur Kritik der Politischen Oekonomie* (*A Contribution to the Critique of Political Economy*) 1861–1863, available at www.marxists.org/archive/marx/works/1863/theories-surplus-value/preface.htm.

understanding of disputes both as a theoretical construct and as a reality. This task is approached from both a historical and contemporary perspective.

The section seeks to examine the framework that enables disagreements, grievances, friction, conflict and other forms of manifestation of dissatisfaction in the workplace to be holistically and collectively described as 'labour disputes'. Finally, it is guided by the fact that theory is based on observations unless deductive, and in turn serves practice.[174] A theory is expected to be internally coherent and plausible, capable of providing explanations for external events and possible predictions. To this extent, a selection of expositions are briefly discussed in this section to facilitate a deeper grasp of industrial disputes as social phenomena.

This discussion begins with a quote: 'Where people work together in an employing organization it would be expecting too much of human nature that disputes should not arise between employers and workers and for that matter between different groups of workers and within management.'[175] Anstey quotes from the United Nations (UN) as follows: preventive diplomacy is-

[a]ction to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter.[176] He quotes further that preventive diplomacy is also–

> [e]mployed to forestall policies that create social and political tension. These policies include human right violations such as denial of individual's freedom of expression or right to a fair trial) or discrimination against people on grounds of ethnic, linguistic or religious identity or political belief … [It is] by definition low key, undramatic, invisible but it is cheaper than peace keeping or war.[177]

Labour disputes are conflicts of views between employers and employees. Disputes cover a wide variety of situations and their commonest manifestation is the strike. Thus the strike, as a collective phenomenon, facilitates the expression of conflict.[178] Conflict prevention

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[174] Mao Tse-Tung 'On Practice' (1937). See Wheeler *Industrial Conflict: An Integrative Theory* (1985) 253.
[175] Anstey, http:wwwics.si/edu/subsites/ccpdc/pubs/zart/ch13.htm (10/10/2005 1/21
[176] United Nations 1992. See Anstey *Labour Disputes* http:wwwics.si/edu/subsites/ccpdc/pubs/zart/ch13.htm (10/10/2005 1/21
[177] Glover *A Tool for Human Rights and Preventive Diplomacy* (1995) see Anstey at footnote 177
[178] Report of Working Party on Industrial Relations, OECD, 1979.

presumes the escalation of disputes as suggested by the UN and, in fact, trade disputes are the description for normal short-term workplace disagreements.[179] Conflict as commonly used is synonymous with preventive diplomacy or conflict prevention. There is prevention connoting conflict containment, through dispute settlement and conflict resolution. Ordinary prevention is directed at removing potential triggers of conflict and promoting conditions in which collaborative and valued relationships control behaviours.[180] It would appear then that disputes are necessarily internal, capable of being settled via alternative methods. Settlement is thus different from resolution, which often involves judicial decision-making.

As observed earlier, labour relations and concomitant disputes and conflicts lack a theoretical platform. These episodes therefore become anecdotes along a narrative path as conflicts, unions and regulation become the definition instead of the characteristics within a framework. Shalev addresses this problem by pointing out the contemporary concerns with industrial relations theory. The first is whether a core theory is required within a self-justifying stand-alone discipline. This is relevant because it would appear, according to Cox, that theorising is only about 'problem solving in intent, positivist in epistemology and functionalist in method.'[181] The second concern is whether industrial relations theory should be based on assumptions of consensus and stability or those of conflict and change. The third concern is about how to advance knowledge about industrial relations. To this end, Shalev refers to the manner in which legal rules or outcomes reflect the realities of the objective constraints on employee and employer relations in the environment of work. These may be economic, technical or political.[182]

In agreeing with Shalev, this study notes that conflict and change are intrinsic to work relations and the external socio-economic dynamics cannot be divorced from workplace relations, primarily because the workplace is a microcosm of the larger society and, secondly, because socio-economic forces and societal demands impact on plant-level participatory arrangements.[183] With due respect, Shalev, apparently in search of either a deductive or inductive theoretical base, now falls back on the old approach of measuring industrial

[179] (Botswana)Trade Disputes Act [Cap 48:02] Part 1.
[180] Anstey op. cit.
[181] Shalev '*Industrial Relations Theory and The Comparative Study of Industrial Relations and Industrial Conflict ' (1980) British Journal of Industrial Relations*
[182] Wood 'The Industrial Relations System: Concept as Basis for Theory in Industrial Relations' (1975) 8(3) *BJIR* 291–308.
[183] Ibid

relations using factors such as the occurrence of strikes in different contexts. That being so, a more concise definition of conflict could be helpful.

3.5.1 Historical dimension

In keeping with the theme of chapter 2, it can be assumed that, with regard to Africa, the historical framework of labour disputes has been established. This is because the indicators so far suggest that strikes and legislation appear to form the major bases of good industrial relations. Like Japan, Europe experienced peasant rebellions as mainly sporadic outbursts of explosive class-experienced discontent. These were essentially conflicts over systems vying for dominance and the balancing of perceived inequalities. Though these conflicts were often brutally suppressed, the wisdom of negotiation finally became evident. Within these contexts, these rebellions were purely economic and essentially work-related rather than political. There were peasant revolts in France (1358), England (1381), Zurich (1489), and Germany (1520), the Kett's Rebellion (in England in 1549), the Diggers and Levellers movements (in England in the seventeenth century) and the Irish tithe war (1831 to 1838).[184]

Italy offers a testimony of how evolutionary trends shape employer–employee state relationships through a list of the causes of disputes over the period from 1969 to 1978. This study considers historical and contemporaneous discussions as essentially continuities of the same. Therefore, the following issues are assumed to represent causes of disputes generally, although with different contextual variables. These factors or causes are covered below.

- The failure of state policy to keep a non-inflationary context under control;
- A rapid growth in conflicts by 1969, associated with greater wage demands by workers of all ranks, coupled with a diffusion of bargaining and conflict in individual firms and a widening of union objectives;
- A rapid increase in labour productivity, cuts in work time, increase in work intensity, pressure on labour formations and the failure of the National Economic Plan for 1966 to 1970 (*Programma Economico Nazionale*) regarding social objectives such as income and employment differentials and social investment;

[184]Foster, Class Struggle and the Industrial Revolution (2003) 368

- The unsatisfied demand of workers for public goods and services and the failure of the state to provide the promised social safety net. In 1969, therefore, there was a strong demand from the working class for higher wages and better working conditions;
- The growth of industrial concentration, the rise of the modern formalisation of work and work contracts against the informal sector, and the exclusion of some from the formal labour market;
- The greater homogeneity of the workforce led to greater and more cohesive aggregation of complaints coupled with fundamental changes in worker formations and labour laws (e.g. the *statuto dei lavoratori*, which granted more basic rights to workers and unions, making it hard for employers to dismiss workers).[185]

These developments led to disputes and subsequently to conflicts. The conflicts, the combative and defensive reactions and such demonstrations were manifestations of the fact that 'social systems are the products of interaction between environmental conditions and strategic choices made by their stakeholder as they seek to protect and advance their interests.'[186] An inspection of the histories of the developing countries shows a close similarity to Italy in its march towards full industrialisation. Ultimately, both sides see the futility of bellicosity and therefore arrive at a compromise to develop long-term policy founded on informed analysis, so that problems can be addressed before they mature into conflicts. In short, the lessons of the past led to the transformation of trade guilds into unions. Institutionalised liberalism formalised both corporate and collective employee autonomy, and statutorily entrenched this and the negotiation processes. The result, according to Anstey, was the demise of the struggle over which system to adopt. In its place came internal forms short-term dispute resolution.[187]

It is worth noting that, since the end of the Second World War, industrial relations had resisted all forms of concise definition. There were attempts to define disputes and conflicts but it would seem that, too often, the symptoms were mistaken for the disease. One definition was the following:

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[185] Valli *Industrial Conflict and the Trade Unions in the 1970s*: *The Italian Case* OECD Report (1980) 189.
[186] Anstey *Corporatism, Collective Bargaining and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* (unpublished DPhil) 1 of 21.
[187] Anstey op cit 2.

> Industrial conflict is a somewhat ambiguous term, since it includes every type of dispute between employer and worker; it covers the whole gamut of action that might be taken by employers and workers as a means of expressing their dissatisfaction with the other party to the employment contract or collective agreement.[188]

The definition then goes on to state that 'industrial conflict means the strike and lockout' and is a part of the seamless web of industrial relations.[189] The workplace is generally considered to be an environment for constant acrimonious confrontations. Several studies have considered the causes of disputes in the workplace and many have developed comprehensive lists of factors. Roberts states that contractual problems flow from a combination of employee uncertainty and a limited ability to think and communicate.[190] They suggest that there are three basic factors that drive the development of disputes. One is a high degree of uncertainty arising from the complexity and dynamics of the terms and conditions of contract and labour legislation. The second factor is imperfect contracts that do not and cannot predict possible future problems. The third factor is the opportunistic behaviour of many parties who try to take advantage of one another in the competitive labour market to the disadvantage of the worker.[191]

It appears that, to many observers, workplace relations are perceived as dispute-prone, litigious, adversarial and a creator of many unnecessary conflictual situations. It is suggested that this perception may in fact be based upon a claims culture that frequently results in lengthy negotiations in order to settle the claims.

Below is a summary of Kumaraswamy's examination of the common causes of claims and conflict in the course of construction projects. The constant rancour between employees and employers (contractors, consultants and clients) as to the causes of construction claims led him to differentiate between 'root' causes and 'proximate' causes. The 'root' causes are not immediately observable. They are the seeds of potential conflict sown at the commencement of the relationship, for example, unfair or unclear risk allocation. 'Proximate' causes are immediately apparent, for example, poor conditions of work, occupational risks and hazards, poor wages, or delayed wages.

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[188] Roberts *Growth and Development of Industrial Conflicts since 1945* (1974) 3.
[189] Ibid.
[190] Ibid 1
[191] Dobson, Masters and Journeymen: A Prehistory of Industrial Relations 1717-1800 (1980) 16

These and other causes lead to claims or demands that originate from variable, unsatisfactory factors. These causative factors are explained below.

3.5.2 Common root causes

These include unfair risk allocation in the division of labour and tasks, unclear risk allocation, uncontrollable external events, an adversarial culture, an inappropriate contract type, a lack of competence, the deliberate deskilling of workers and resultant lack of professionalism, unrealistic expectations, poor communication, interpersonal clashes, vested interests and internal disputes.

3.5.3 Common proximate causes

These emanate from and replicate the root causes, which may be historical, economic, ideological and systemic. Being the seedbeds of disputes, they ultimately transform disputes into conflicts, protracted, sometimes exogenous or externalised, but often intractable.[192] What is clear for the foregoing is that there are myriad causes of disputes. Subsumed within this plethora are core labour problems. Removed from this seething mass, labour disputes assume their own problematic shape, size and dynamics.

Authors such as Roberts define industrial conflict as follows; [i]ndustrial conflict is defined as every type of dispute between employer and worker; it covers the whole gamut of action that might be taken by employers and workers as a means of expressing their dissatisfaction with the other party.[193] He goes on to say that 'industrial conflict means the strike or lock-out'.[194] Neither of these define labour disputes but rather illustrate them. A strike is a manifestation of a dispute just as other forms of expression of dissatisfaction are.

Labour disputes are generally grouped as disputes of right and disputes of interest. A dispute of rights deals with the interpretation and application of the provisions of any relevant Act, the terms and conditions of a contract and its existence or not and the resultant legal rights. It

[192] Kuraswamy ARCOM (1996) 12Annual Conference &AGM 11-13 September.190
[193] Roberts op cit. 1
[194] Ibid.

also includes collective agreements, their actual existence or not, and the recognition of trade unions. On the other hand, a dispute of interest deals with any other matters that are work-related, such as wage increments.[195] From the definitions in the Trade Disputes Act (Botswana) and the Lesotho Labour Code Order, it is evident that labour disputes can emanate from minor lapses in workplace administration.[196] A grievance can therefore be a complaint, real or ill-founded, laid by an employee against the behaviour of anyone in management.[197] Disciplinary issues are those complaints raised by management against employees.

Grievances and disciplinary issues are intended to be managed through established codes and procedures. Integral to this is the process of negotiation, where two parties come together to effect consensual agreements through persuasion and constructive compromise.[198] Bargaining is where parties propose changes to the *status quo* and trade-off positions as necessary. In effect, a dispute calling for statutory intervention is one that could be an outgrowth of the degree of loss or acrimony in these transactional experiences. Complaints may be individual or collective. Individual complaints may be of a legal nature and generally concern the variation of terms and conditions, have no public profile, do not affect productivity, and therefore have little or no impact on social peace. However, because they give rise to different interpretations of enforceable standards of a jurisprudential nature, they could become a source of public concern and a cause of changes to public policy.

3.5.4 Wheeler's integrative theory

[195] The Lesotho Labour Code Order defines a dispute of right as 'a dispute concerning the application and interpretation of any provision of the Labour Code or any other labour law, collective agreement or contact of employment'. A dispute of interest is defined as 'a trade dispute concerning a matter of mutual interest to employees but does not include a dispute of right' (Lesotho Labour Code Amendment, Gazette No. 30 of 25 April 2000.
Under the Trade Disputes Act [Cap 48:02] of Botswana, the coverage is more detailed, and reads as follows: a dispute of right means 'a dispute concerning an infringement of a right flowing from statutory law, collective agreements or individual employment contracts, or the conferment of a benefit to which the claimant is legally entitled'. A dispute of interest is a dispute 'concerning the creation of new terms and conditions of employment or the variation of existing terms and conditions of employment'.
[196] Ibid.
[197] Genard & Judge *Employment Relations* (1997) 147.
[198] Kumaraswamy supra

Wheeler's interpretation takes a different approach. His integrative theory of industrial disputes hinges on five pillars.[199] The first is that humanity exhibits some innate predispositions that do not derive only from economic rationality and reaction to environmental determinism,[200] but also from internally driven needs as enunciated by Rostow in his hierarchy of needs. Secondly, there is the inclination towards material and social dominance. The second pillar is based on the assumption that disputes are grounded in material and social dominance.[201] There are also humanity's expectations and achievements, which are based on the gaps between the expectations and achievements of workers, and which are seen as a necessary condition for disputes. Where an employer is unsuccessful in closing such gaps, he or she produces a readiness for aggressive action via a frustration–aggression path.

This readiness for aggressive action may be traceable to frustration, threats and a perception of discriminatory activities that disadvantage the worker within his or her orbit of comparisons.[202] Therefore, a decision to adopt the frustration–aggression path results from the inability to actualise intense material resources or dominance, the process for which is blocked, inducing courage and anger. Removal of expected returns may also point the way to threats. Rational calculations are then used to opt for aggression on a cost-benefit basis.[203] This fifth pillar is manifested through the strike and other forms of confrontation and protest. Generally, however, such action requires the existence of bands of loyalty, or affection exhibited within a given collective community. Solidarity and hope of success become essential requirements, coupled with the organisational ability of a leadership.

Disputes may not explode into disruptive behaviour where their tactical and strategic value could be wasted. In a work situation, the use of the threat of collective industrial action becomes more effective than its actualisation, due to the possibility of such action backfiring on the workers themselves.[204] In sum, the integrative theory postulates the certain environmental factors that are required for labour disputes as above. Wheeler's postulations reflect reality and can be seen at play in the workplace. To this extent, they satisfy the quest

[199] These are innate predispositions, material and social dominance, humanity's expectations and achievements, readiness for aggressive action and collective aggressive action.
[200] Wheeler, Industrial Conflict: An Integrative Theory (1985) 1- 293
[201] Ibid 255.
[202] Ibid 260.
[203] Ibid.
[204] Ibid.

for coherence and plausibility while facilitating a better comprehension of the dynamics of the workplace.

Kulcsar and Cain debate what they refer to as the 'dispute industry' at various theoretical levels. In their theory of universality**,** there is the assumption that disputes are generic to human society as societal relations play a role in the disputing process. This is akin to non-equilibrium being the regenerative tool for the survival, growth and response of societal systems to internal and internal conditions. This notion also finds affinity in the idea that trouble triggers organisational change. The notion of disputes derives from fundamental tenets of legal ideology. Law is utilised to resolve disputes. The concept of disputes depoliticises conflicts.[205] The contentious issue is whether law becomes a conscious social tool for dispute resolution or whether disputes, endemic as they are, can be resolved without recourse to the law. By extension, the presumption that legal institutions are the best ways of settling disputes becomes rebuttable.

The individual, as a bearer of rights, expects the law to provide the means for redressing social conflict where the remedial capacity of the law is evident. Industrial conflict, as traditionally understood, refers to all types of disputes between the employer and worker and the manifestations thereof.[206] Generally, disputes may arise from unsatisfied political demands for reforms, social services, and other societal expectations.[207] It is equally important to note that the organic law as erected, can, of its own accord, become the course of labour disputes.

3.6 The theory of ideological functionalism

This theory postulates that members of society expect to experience justice. Therefore, conflict may be either functional or dysfunctional because society, being order-prone, views disputes as temporary disorder. Similarly, disputes could be utilised to trigger changes within the system or to paralyse it. However, this deals more with the functions of disputes rather than the root causes. It is appreciated that labour disputes can be triggered for non-industrial

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[205] Kulcsar & Cain 'Thinking Disputes: An Essay on the Origins of the Dispute Industry (1981–1982) 16(3) *Law and Society Review* 375–402 at 392.
[206] Roberts *Growth and Development of Industrial Conflicts since 1985* (1974) 1 (3)
[207] Tarantelli & Wilke *Management of Industrial Conflict in the Recession of the 1970s: Britain, Germany and Italy* (1981) 6.

purposes: Anstey alludes to this in respect of the political role of the Congress of South African Trade Unions (COSATU) in South Africa's struggle against the apartheid state.[208]

3.6.1 The theory of the qualitative identity

With reference to the parties, this theory presupposes that, according to pluralist conflict theory, actors in a dispute may differ in power or skill levels but only in one dimension. Power, money and skills could be given to the party in need and the difference disappears. In effect, the difference between an employer and employee is mainly quantitative. In legal ideology, both are identical but not the same. A theorised microcosmic nature of the workplace would better explain the latent differences. For example, knowledge (ideology) and organisation (politics) may be reducible to a quantitative dimension (economy). The reality, however, is that social and organisational stratification within the workplace precludes the equality of the actors.[209] Thus, the study argues, the inherent structural inequalities and their actual manifestations cause disputes.

3.7 Transformational stages of disputes

Some fundamental distinctions are useful at this point. A dispute is taken to mean a situation where a claim has been rejected, a claim being an assertion by one of the parties to a perceived right. This rejection may be in part or in whole or the claim may simply be ignored by the other party. Essentially it is objective in nature because an independent third party can recognise and observe the main characteristics and be able to state that a dispute exists. It may, however, not be as clear cut in a practical situation. According to Felstiner et al[210] the important transformations of disputes are naming, blaming and claiming. An individual or a party may suffer an injurious experience and, for it to be a grievance, he or she must recognise and label it, hence the first transformation: 'naming'. The second transformation occurs when this grievance is attributed to the fault of the other party: 'blaming'. The next transformation occurs under the heading 'claiming', when the grievance is voiced to the party believed to be at fault. The final transformation occurs when the grievance is rejected, in

[208] Anstey op cit 9.
[209] Kulcsar & Cain 'Thinking Disputes: An Essay on the Origins of the Dispute Industry' 16, 3 (1981- 1982) 392.
[210] Felstiner et al 'The Emergence and Transformation of Disputes' (1980) *Law and Society* 15.

whole or in part, or is ignored by the other party. The key words to identify a dispute are therefore a claim and rejection.

The major stages in Felstiner's model are thus naming, which is recognising an experience as injurious and labelling the problem, and blaming or attributing the cause of the problem to another person. It also involves claiming, that is, informing the person believed to be at fault with the substance of the complaint and the declaration of a dispute, which occurs when the other person either rejects the claim, in whole or in part, or ignores the claim. In addition to these observable processes, Felstiner et al make specific observations on the characteristics of the transformations that occur during the process.

3.7.1 Contextualising labour dispute resolution

The concept of disputes has been important to legal anthropology since Gulliver's seminal work.[211] According to Moore,[212] specifically, the modern concept of disputes is rooted in anthropological studies of law, social control and conflict theory. Kulcsar and Cain had earlier postulated that because society, by definition, is ordered, disputes are moments of social disorder and therefore transient.[213] The problem, at this juncture, is that of recurrence of the transient social disorder. For immediate purposes, the discourse is narrowed to definitive issues relating to the labour process through the employment contract and how the process generates disputes.

The area of labour dispute resolution is arguably well explored, except when one talks of the complex political and legal phenomenon of disputes, the centrality of the state and the comparative stature of International Labour Standards (ILS) in the schema in southern Africa. Most southern African countries have established statutory structures such as Industrial Courts, tribunals, commissions and boards. The most preferred methods of resolving disputes are collectively referred to as alternative dispute resolution (ADR), which covers any means of settling disputes outside the courtroom and the formal processes of statutory arbitration. Some are voluntary, while others are mandatory. They include, among others, negotiation, consultation, conciliation, mediation and adjudication.

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[212] Moore, *Law and Anthropology* 2(1969) in Kulcsar & Cain 2(1969)376
[213] Cain & Kulcsar op cit 379.

This indicates that one critical aspect of understanding the cause of disputes and the current *modus operandi* for their resolution is to examine and evaluate the form, function and purpose of the rules created to regulate social power. These forms of regulation and procedures give rise to conflicts. However, as Crouch[214] has explained, instrumental compliance and relations only reflect market relations. They do not reflect political power relations in terms of legitimacy and authority. In effect, simmering anger may be papered over by compliance, but the socio-political allegiances of the same workers should not be taken for granted. Along the spectrum of power relations, one resilient and intransigent element underpinning labour disputes is the often dehumanising commodification of labour.

3.7.2 Conclusion

Labour law has a necessary historical dimension as exemplified in the doctrine of precedent. Law is a historical process of evolutionary development where common law and equity judges have incrementally developed principles and where, from time to time, legislative intervention has sent that development off on a different course. But even where the legislature has intervened to prescribe or codify the law, the courts will construe and apply the legislation against the background of the judge-made law. The reconciliation of conflicts by lawful process is 'a cultural achievement of universal significance'.[215]

The great works of labour history illuminate contemporary controversy. They provide a hinterland of ideas that helps to put the day-to-day battles into perspective. Labour history provides the contemporary practitioner with the colourful, complex and ambivalent story of the central concept of industrial relations. There is thus nothing peculiar about this exploratory exposition of the evolution of labour relations the world over, precisely because the yearnings of workers are universal, the machinations of employers are essentially the same, the hegemonic inclinations of the political state are a commonality, and efforts at managing workplace discontent and disputes are still ongoing.

3.8 Regulation in the context of employment relations

3.8.1 Defining regulation

[214] Gulliver, *Social Control in an African Society* in Kulcsar & Cain 2(1963) 376
[215] Ibid.

People hold strong views about regulation, but do they know what 'regulation' means? Both regime and regulation theorists come up with different suppositions, yet the meaning of the term 'to regulate' is difficult to unravel. Mill observed that 'we do not [always] understand the grounds of our opinion. But when we turn to . . . morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it.'[216]

During the past century, substantial resources were invested in the politics and scholarship of regulation. Nonetheless, the term 'regulation' appears to escape a clear definition. Although regulation has been one of the most controversial topics in law and politics, it has also been one of the most misunderstood concepts in modern legal thinking. According to Francis, the function of regulation in the context of a political state is to set limits on private conduct. It is state intervention in private spheres of activity to realise public purposes.[217] This implies a public interest and legal perspective that assumes that the state, acting in the public interest, establishes a legal framework to realise a specific set of regulatory objectives.[218] In line with this, while formal institutions are agents of the form and nature, it is the ethos of the state that explains the political calculations that inform regulation.[219]

Legislation, as a form of regulation, deals with law that, in any case, is supposed to be a captive of social forces such as the labour market. Perhaps this is why socio-legal studies proponents only concern themselves with the function of law in society.[220] Considering that deregulation is the removal of formal controls to allow common-law controls to operate, legislation could then be interpreted as intervention to restrict the inroads of the common law. These may be ascertainable from sources such as the Hansard, judicial rulings and by the ideological orientation within the existing political economy.

The evasive nature of the term 'regulation' is largely a product of confusion between two unrelated matters: the abstract concept of regulation and opinions about the desirable scope of regulatory powers or desirable regulatory policies. People intuitively understand the word

[216] Professor of Law, University of Arizona College of Law. See www.orbach.org. This essay is the first work in the 'What Is' series published by the Yale Journal on Regulation Online.
[217] Francis *The Politics of Regulation: A Comparative Perspective* (1993) 1-4
[218] Ibid 7.
[219] Ibid 5.
[220] Fosh & Litter *Industrial Relations and the Law in the 1980s: Issues and Future Trends* (1985) 22

‘regulation’ to mean government intervention in liberty and choices, through legal rules that define the legally available options and through legal rules that manipulate incentives. But, too often, ideologies and pre-existing beliefs dictate perceptions as to what intervention means and whether intervention is needed. This pattern results in inconsistent preferences for regulation and obscures the understanding of the term.

3.8.2 Labour law and regulation

This section attempts to draw a distinction between the contextual use of ‘regulation’ in labour law and its generic application. The definition of regulation as intervention in the private domain is quite old. Of course, there is some truth in most perceptions of regulation. Regulation may be used to require or proscribe conduct, it may come in the form of administrative rules, it may serve interest groups, and it may generate waste. Regulation occurs in several spheres of labour law, such as the labour market and international standards. However, it tends to assume a different connotation when used to qualify governmental activity with particular reference to trade disputes and labour formations.

Traditional labour law encompasses employment law, collective relations law, and social security law. Employment laws govern the individual employment contract and the terms and conditions thereof. Collective or industrial relations laws regulate the bargaining, adoption, and enforcement of collective agreements and the by-products of the dynamics of the socialisation process at work, such as the organisation of trade unions, and industrial action by workers and employers. Social security laws govern the social response to needs and conditions that have a significant impact on quality of life, such as old age, disability, death, sickness, and unemployment.

Labour law is underpinned by theories of institutional choice, the efficiency theory, the political power theory, and the legal theory. Labour law concerns itself more with the political power theory, where institutions are shaped by those in power to benefit themselves at the expense of those not in power, and limiting the extent of redistribution. Under the legal theory, a country’s approach to regulation is shaped by its legal tradition, history and philosophy and, by implication, how these affect workers. The term ‘regulation’ can be dealt with at two levels: one is the abstract concept of regulation and the other is the opinions about the desirable scope of regulatory powers or desirable regulatory policies. Generally,

regulation is understood to mean an authoritative (government) intervention resulting in the limitation of basic freedoms. This is done through legislation that defines the legally available options and reward systems.

Intervention by legislation per se may not be restrictive. Regulation, therefore, can produce myriad definitions, mostly subjective, and also varied consequences. With regard to labour law, the automatic understanding of regulation has been state intervention in the private arena or a legal rule that implements such intervention. The implementing rule is a binding legal norm created by a state organ that intends to shape the conduct of individuals, labour and other social formations. The state organ, the regulator, may comprise the political elite, including the legislature, the executive and the administrative bureaucracy that wields the legal power. These are not the restrictions or rules or regulations or even delegated legislation and laws that serve interest groups. This is regulation that is essentially statutory in nature.
Demonstrating how regulation relates to and impacts upon labour law and employment relations generally is the challenge with which we are faced.

3.8.3 Transnational private labour regulation (TPLR)

It appears that either a collective frustration with the state has emerged or a collective perception of the state as a failed centralised institution incapable of harnessing and regulating all sectors of society has emerged**.** This perceived governance deficit has led to the conclusion that a transformation of the regulatory state and the limits of its capacity are needed. This limitation should also include law so that other actors can effectively regulate certain spheres of economic and social activity. One of the proponents is said to have proclaimed that the move to governance 'represents a much broader shift in regulatory theory, reflecting a move form centralised command and control regulation to a more dynamic, reflexive and flexible regime'[221] [where] 'the exercise of normative authority is pluralised.'[222]

It is acceptable that principles are intended to promote the internal self-regulation of other social activities at different levels. However, this movement advocates that multi-national

[221] Lobel 'New Deal' in Kolben *Towards an Integrative Theory of Transnational Labour Regulation* Regulating For Decent Work Conference, ILO, 2009.
[222] Kolben op cit 14.

corporations (MNCs) should be legislators, regulators and enforcers of norm which can be assisted by other social organisations which play the role of watchdogs. It appears that this movement is a scheme to effectively neutralise, marginalise and ultimately render the state irrelevant so as to dominate labour legislation reforms. Given the potential for dismantling institutions of labour studies, Kolben wishes for an examination of its derivative theories.

3.8.4 Systems theory

The systems theory is grounded in the law and society movement, which underscores systemic autonomy. Led by Teubner,[223] it postulates that the legal system exhibits an incapacity to communicate[224] with the differentiated social systems in their plurality and ultimately makes laws that are either irrelevant or that have an disintegrating effect on that social area of life, or that have a disintegrating impact on regulatory law itself. Since state law is insufficient to resolve conflicts within these systems, but has the potential to destroy valued patterns of life in that society, then the state forfeits its monopoly. In its place would be a plurality of legal orders, functioning independently of the state.[225] Their law-making, however, must be informed by reflexivity or governance or accountability. Teubner appears to have had a significant influence on the theoretical foundations of the movement, but it is not clear if his primary purpose was also the eventual demise of the state.

3.8.5 Responsive regulation

This theory presupposes that although policy goals and the attendant rules and regulations are made by others, the addressees of these laws, power and authority should be left to decide how to meet the objectives of those legal rules. In other words, regulators must be responsive to the innate desire of those who are expected to comply to deliberate and engage with the regulators in debates about the rules. This aspect is commendable as participatory decision-making, even if symbolic, makes legitimisation and compliance easier.

3.8.6 New governance

[223] Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.
[224] Scott 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State?' in Kolben op. cit.
[225] Teubner *Law as an Autopoeitic System* (1993) 203.

New governance is a loose term referring to a broad body of research that has been said to mark a move away from the familiar mode of command and control and fixed rule regulation towards multi-level, collaborative, multi-tier, adaptive problem-solving. Its key attributes, in addition to those mentioned above, include broad framework agreements, flexible norms, revisable standards, benchmarking, indicators, peer review and accountability. This is in marked contrast to the rigidity of doctrinal substantive legislation with its plodding amendment procedures and protracted judicial processes.

3.8.7 Labour market regulation project

Located at the Centre for Employment and Labour Relations Law (CELRL) at Melbourne University, Australia, and headed by Mitchell, the first objective of this project was to develop labour law as a discipline, with particular regard being paid to developing an understanding of the role of law in regulating all aspects of the labour market. The concept of broadening the frontiers of labour law into all spheres of the local market was first broached in 1984 by Davies and Freedland.[226] This was in reaction to creeping globalisation, unemployment, downsizing and the relocation of industries to more cost-effective environments.

Then the project observed that labour law was contextual rather than conceptually orientated, and ought to seen in action at the level of social interaction not as a collection of doctrinal precepts. So when Mitchell became involved, the perspective adopted had been one of making labour law more relevant by widening the range of work and including factors contributing to the work environment. More importantly, the project sought to recognise the problem as encapsulated in Standing's work on working group categorisations and the implications of industrial citizenship.[227] Mitchell and Gahan proffered that labour law must remain interdisciplinary in focus, orientated towards legal regulation, capable of interrogating the operation and effects of the law in the field, but recognising the variables at work in the labour relations permutation. In that way, labour law is not parochial in perception, but perceptible as existing within the broad field of regulation. As they said:

[226] Davies & Freedland *Labour Law: Texts and Materials* (1984)
[227] Standing op cit

> [L]abour law must also embrace the study of regulation which emanates from other sources – public and private – which impact upon labour markets. Such regulation would include, for example, government policy documents, private arrangements such as the Labour/ACTU Accord, government administrative schemes and bureaucratic systems within enterprises, whether or not they have the force of law.[228]

According to Frazer, the project helped to establish labour law firmly within the ambit of regulation, fortified by a reliance on an interdisciplinary understanding of regulation.

3.8.8 Global labour market regulation

This movement is more of a concerted decision by MNCs rather than a pure academic postulation, because the issues addressed herein have already been meticulously debated elsewhere. In essence, the import is that states should relinquish individual holds on intervention in the labour market and employment relations. This responsibility would then be taken over by a consortium of the actors in the new world economic order, rationalising all labour market regulations under the philosophy of globalisation.

In prefacing his critique, Kolben states that–

> contemporary regulatory and political science theory has described and argued for a transfer of authority away from the state to non-state actors, normative plurality and decentralization from command and control regulatory methodologies towards more disaggregated and experimental methodologies. An important meta-critique that emerges from these theories, however, is that most of its scholarship investigates and discusses regulatory phenomenon that takes place in developed countries.[229]

For Kolben, what this implies is that the developed economies want to impose their choice of labour market neo-liberalism on countries struggling to come to terms with poverty, a lack of resources, poor governance and corruption. These countries need assistance and shoring up, rather than disintegration. The key goal in labour law as a regulatory mechanism is rather the fortification of the state and its agencies and their capacity to cope with the challenges and

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[228] Gahan & Mitchell 'The Limits of Labour Law and the Necessity of Interdisciplinary Analysis' in Mitchell (ed) *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 70.
[229] Kolben op cit 26.

dynamics of a rolling labour market, not its contrived demise. On the whole, this study leaves one with the impression that globalised labour market regulation is the ultimate expression of globalisation in its essence.

3.9 Conclusion

This chapter has helped to justify the character and scope of the study. With regard to employment relations, it has confirmed the belief of the study in the solidity of the ideas of the founders of the discipline. As a result, revisionist critiques have all retraced their steps to the founders, seeking to restate their conceptual premises, affirming their empirical conclusions, and accepting the societal contexts within which these conclusions were drawn. Secondly, the chapter has shown that the study was initially based on much unexplored terrain and untested assumptions. Thirdly, it has shown the importance of understanding the theoretical foundations of the study. Although the themes and concepts might appear rather varied, a closer examination shows a shared affinity, an interdependence and linkage that confirms the perception of employment relations and work-related disputes as inherently interdisciplinary. Chapter 4 outlines the key areas that form the basis of this study.

CHAPTER FOUR

The State in the Context of Employment Relations

4.1 Introduction

In chapter 3, a survey of the spectrum of ideas that inform the subject matter of the study was undertaken. The concepts discussed therein have helped to ascertain that labour disputes and their solution cannot be achieved with one stroke of the legislative pen. This is because, much as the subject itself commands an interdisciplinary approach, labour issues are essentially social, embedded in the socio-economic fabric of any society. Thus, while it is appropriate to examine these, such examination also creates the need to investigate the notion of the state further, as the state appears to be the dominant factor in the dynamics of employment relations.

Chapter 4 is therefore primarily an attempt to examine the state in all its spheres because of its dominant position in labour relations. In this context, labour relations is intended to apply to the environment in which conflicts arise, whether due to certain inherent contradictions in the forms, processes and methods of socialisation or the articulation of relations in the workplace. The state for this purpose is not the nation-state. The 'nation-state' is thought of as a political entity having sovereign authority. This authority is expressed through judicial institutions such as the courts, the legislature and executive agencies. These administer and regulate social processes within the said nation-state. Thus the functional state, embedded in this geographically discrete entity, is seen as a compendium of the political, juridical and economic institutions and structures employed in managing public affairs.[230]

4.2 Defining the state

The state has been defined as 'that summation of privileges and dominating positions which are brought into being by extra-economic power …. I mean by Society, the totality of concepts of all purely natural relations and institutions between man and man.'[231] To

[230] Arthurs 'Labour Law without the State?' (1996) 46(1) University of Toronto Law Journal 1–45 at 7
[231] McElroy (1998) '*Defining the State and Society' The Freeman* Vol.8 No. 4 pp.223-237.

paraphrase, the state uses political means, force or coercion to 'plunder and exploit society' and uses economic means of co-operation. For this reason, the state is an enemy of society.[232]

There is a distinct difference between the nation-state, the state and government. The nation-state has political, juridical and economic space, according to Arthurs.[233] It is usually regarded as a political entity with authority to govern its affairs. Such authority is expressed through created juridical institutions such as the courts, the legislature and the executive or bureaucratic adjuncts as agencies with discretionary rule-making powers. These bodies regulate and administer the socio-economic order and affairs within the boundaries of a country such as Botswana. The characteristics of such a nation-state may include the degree to which principles of the rule of law and the separation of powers exist and are enforceable. It also includes the political and social status accorded to citizens, either through structured economic differentiation or social stratification and, finally, the degree of intervention in the private space of the individual.[234]

On the other hand, the 'state' is defined, in contradistinction from society, as a constitutional aggregation, a power situated above society, a territorial concentration that has always been in the hands of a few who control the myriad functions in the life of societies.[235] More critically for this study, the state as used in this context represents an abstract theoretical construct that is therefore not concrete. The state is only an analytical tool and not an entity. The analytical approach to the state is therefore methodological individualism. This approach states that only individuals exist in reality, so the family, church, state and other forms of societal congregation result only from institutional frameworks.[236]

It has been suggested that both the juridical and political spaces are aligned but create room for exceptions, such as supranational institutions whose normative influence outweighs that of the nation-state. These include the ILO, supranational juridical regimes such as the International Criminal Court (ICC), the European Court of Human Rights (ECHR), the European Court of Justice (ECJ), the United Nations Commission on International Trade Law (UNCITRAL), and also sub-regional juridical bodies such as SADC and the African Union

[232] Ibid.
[233] Arthurs op. cit. (1996) 46(1) *University of Toronto Law Journal* 1–45
[234] Ibid.
[235] Kropotkin *The State: Its Historic Role* (1897) 10. See http://www.panarchy.org/kropotkin/1897.state.html.
[236] McElroy (1998) op. cit.

(AU) with their Protocols.[237] The potential result of the existence of these institutions is that, coupled with diffused indigenous legal orders, there is thus considered evidence of the 'hollowing out of the state'.[238] In this regard, given the fact that the nation-state is being engulfed by exogenous but higher juridical, moral and doctrinal institutions, it could actually be losing its grip on jurisdictional and sovereign power.

From this perspective, one visualises the institutional machinery known as the state which is embedded and shored up by its accessibility to agents of command and control. This is irrespective of the fact that its capacity for governance, legitimacy and relevance are questioned because it exhibits a distasteful exhibition of graft and corruption.[239] The value of the state is now assessed in terms of the political economy of the nation-state and its assumed role as the custodian of economic life. Thus the perceived dysfunctionality of the machinery of state has become one of its threats.[240]

4.3 Other dimensions of the state

Governance theory implies that responsibilities and boundaries become less evident and the traditional nation-state no longer functions as the prime mover for addressing social and economic issues, and governing becomes tracing and monitoring those mechanisms that do not depend on the authority and sanctions of the government.[241] '[A]t its core [governance] describes a process in which regulatory authority and legitimacy have become de-centred from the state and from government.'[242] It is therefore now conceptualised as having become diffused, dispersed and dislocated among multiple actors, whether private, international or domestic.

Governance is thus expansively defined as–

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[237] Wolfe 'The Wealth or Regions: Rethinking Industrial Policy' Unpublished paper presented to the annual meeting of the Canadian Political Science Association.
[238] See Jessop 'Towards Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy' (1993) *St. Pol. Eco.* 7.
[239] Van Dun 'Philosophical Statism and the Illusions of Citizenship: Reflections on the Neutral State' in (eds.) Bouget and Chalmer (1995) *Philosophica*, Vol.56
[240] See McElroy 'Defining the State and Society' (1998) 8(4) *The Freeman* 223–227.
[241] Kolben 'Towards an Integrative Theory of Transnational Labour Regulation' (Regulating for Decent Work) ILO, (2009) 12
[242] Ibid

> 'All processes and institutions, both formal and informal, that guide and restrain the collective activities of a group …. Governance need not necessarily be conducted exclusively by government and the international organizations to which they delegate authority. Private firms, associations of firms, nongovernmental organizations (NGOs) and associations of NGOs all engage in it, often in association with governmental bodies, to create governance, sometimes without government authority.'[243]

Government is then also considered as consisting of 'specific personnel and policies located at a particular time in history. But no state can be adequately summarised by the actions of anyone or several of its governments.'[244]

In the context of Botswana, one may define the state as the political leadership comprising the President, the Speaker, the deputy, members of parliament, ministers, assistant ministers, councillors, and members of the *ntlo ya dikgosi* (House of Chiefs). The House has recently been increased to 35 persons, all of whom are salaried public officers as provided for by the Chieftainship Act,[245] and who are subject to the political authority of the Minister of Local Government. In a sense, this is the continuation of the colonial strategy of dependence. Included in this group would be the remote but active members of the business community, such as the owners of ranches, farms, hotels, and hospitality and other service enterprises. Added to these would be the coterie of co-opted academics, senior civil servants and those with access to political power and patronage and then the higher echelons of the public bureaucracy. Such a state is also said to consist of the judiciary, the police service and the armed forces.

In Swaziland, the state could be described as comprising the King in Council.[246] The King has established a parallel system based on edicts by decrees, with a semi-feudal *tinkhundla* system based on chiefly power. The parliamentary system or *libadla* is bicameral. The King appoints 20 members of the Senate and the other 10 come from the House of Assembly. The House of Assembly has 55 elected members, and the King appoints 10 members. According to Decree No 2, the King-in-Council may, whenever it is deemed in the public interest, order the detention of any person for a period not exceeding 60 days in respect of any one order.

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[243] Kolben op. cit. pp.12-13
[244] Sycholt & Klerck (1997) *The State and Labor Relations: Walking the Tightrope Between Corporatism and Neo-liberalism* 201.
[245] Chieftainship Act [Cap 41:01].
[246] Constitution of the Kingdom of Swaziland, 2005.

Consecutive orders may be issued as necessary and no court shall have the power to hear any case in this regard. In essence, therefore, all the functionaries who, together with the King and his chiefs ensure the hegemony of royalty, constitute the state in Swaziland.

In the case of Lesotho, the state comprises the King as ceremonial head, the principal chiefs, the executive, the legislature, the judiciary, the defence force, the police and the national security service.[247] In Botswana, the clearest convergence of interests among the elites is private capital accumulation manifested in cattle farming. This choice is the result of both the nature of the terrain and a deliberate colonial policy of nurturing a specific form of capital accumulation based on a distinct 'class of cattle accumulators', including the 'new intelligentsia'.[248]

In his analysis, Tsie traced the functional collaboration of the elites and civil servants in their mutual need to control the resources related to cattle accumulation and the erection of stable structures that would ensure access to the labour power of the dominated segments of the society.[249] An example is the collaborative, symbiotic role of the institution of the traditional elite. This could be because of superficial historical generalisations about socio-economic processes that distort the historical linkages between groups in hierarchically structured societies where chiefly authority is cultural rather than political.

In sum, there is an invisible but direct, definitive, functional relationship between the traditional elite and the state, which facilitates their co-optation through the instrumentality of legislation such as the Chieftainship Act in Botswana.[250] Within this process, therefore, the political leadership have been able to indulge in the creation of a generally powerful bureaucracy capable of formulating and effecting development policy. As Tsie acknowledged, the net result was and has always been a state-engineered and centrally dominated administrative process that ascertains firm control of the allocation of developmental resources.[251]

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[247] The Constitution of Lesotho, 1993
[248] Tsie 'The Political Context of Botswana's Economic Performance' Unpublished paper, Department of Political and Administrative Studies, University of Botswana (1992) 4.
[249] Ibid.
[250] [Cap 41:01].
[251] Op. cit Tsie 4.

The nature of the state normalises a stable, cohesive stratification of society. The consequent trade-offs, such as overlapping directorships, subsidies and even accommodation of bureaucratic excesses, have operated to confirm the indispensability of the bureaucracy in tandem with the proliferation of its organic interests. Given the current climate of maladministration, the public bureaucracy might yet justify past observations that it suffers from 'gross mismanagement and dishonesty'.[252]

4.4 Juridification

Juridification is a term increasingly occurring in the widest range of contexts. Its use is, however, probably nowhere more justified than where the structure and the objectives of labour regulations are being discussed. It could be said that labour law constitutes the classic paradigm for juridification. In terms of both the background and the evolution of the juridification process, the context of the origin and the development of labour law provides a practically suitable environment in which it can be best appreciated.[253]

Bates stated that–

> Government intervention … creates opportunities for conferring privileged access to commodities that have been rendered scarce in comparison to the demand for them. Privileged access is used by the elites … for direct personal gain or to create a political following. The [obvious] political attractions ... help to explain why, when given a choice between market and non-market means of achieving the same end, African Governments often choose intervention measures.[254]

According to Teubner, two major problems arise from a penchant for legislating. First, in a complex, functionally differentiated society, this may cause the law to become decentred through a process of cognitive limitation of normative legitimacy. Cognitive limitation refers to the recognition by the state that it has come to a dead-end of objective regulatory law. At this point society becomes too complex for effective control by state-centrist intervention

[252] Herman Quill, Former Governor of Bank of Botswana, BOCCIM Seminar, Business Gazette, 11 October 1995.
[253] Semitis 'The Juridification of Labour Relations' (1986) 7 *Comparative Labour Law and Policy Journal* 93.
[254] Menocal op cit 767.

alone.[255] This results in excessive, multi-layered rule-making or legal pluralism or, simply, juridification.[256]

A direct consequence is the spontaneous multiplicity of bureaucratic structures with administrative rule-making and quasi-adjudication authority like the labour-related structures. This development might be through delegated discretionary authority or through the usurping of such authority. At times it may also result in extra-judicial rule-making, in addition to the judiciary's constitutionally guaranteed mandate to settle disputes and interpret the law.[257]

Working within the ambit of state delegated institutional authority, these structures, hitherto referred to as the public bureaucracy, are able to nudge the institution of state in a predetermined direction through informed feedback. In other words, the political machinery of state, through its bureaucratic organs, is able to regulate and administer society in a particular manner using the selective allocation of resources as part of its strategy of sanction and reward.[258]

4.5 The interventionist state

The study reiterates that post-colonial societies demonstrate either a strong reaction against all things colonial or, in the main, rely on what has been assimilated in terms of administration, governance, control and command. Their bureaucratic adjuncts become closed societies. For this reason, it makes sense to constantly retrace the steps to the past in trying to understand the present for the future. Within a historical context, political thinkers from Madison[259] to de Tocqueville[260] recognised that associations promised the liberty of expression for individual citizens while posing a threat to political stability. This is so because they could turn into hotbeds or 'violent factions'. Yet, for Rousseau, associations were undesirable even if they did not turn to violence.[261] As 'societies within society', they

[255] Hess 'Social Reporting: A Reflexive Law Approach to Corporate Responsiveness' (1999) 25 *Journal of Corporation Law* 41.
[256] Ibid.
[257] Wangenheim & Von Georg op cit. 560.
[258] Bates in Menocal op cit 767.
[259] Madison, Federalist Papers (Paper no. 10) in Woll Ibid 4
[260] De Tocqueville *Democracy in America* (1966) See Woll, *The Demise of Statism? Associations and Transformation of Interest Intermediation in France* (chapter prepared for Sylvain Brouard, Andrew Appleton and Amy Mazur (eds) The French Fifth Republic at Fifty: Beyond Stereotypes, Routledge (2009) 226-246 (4)
[261] Rousseau, Jean-Jacques 'The Social Contract' see Woll (4)

affected the interests of their members and therefore prohibited the free expression of the general will.

The state is also described as all government institutions that have a monopoly on the legitimate use of force. Therefore, in terms of employment relations, the state is normally taken to mean the elected government of the day, together with all other agencies that carry out the will of government and implement its policies and legislation. The state then could be seen as the 'elected government of the day, together with all other agencies that carry out its will and implement its policies and legislation' [262] One of the prime tasks of government then is to manage the economy so that it is prosperous. This means it has to try to achieve key economic policy objectives, each one of which can easily conflict with the others.[263]

Within this broad framework, the state appropriates to itself other functions. It proceeds to typically hold and exercise sovereign legislative power as well as a virtual monopoly of the means of violence. Thus it controls both the power of the sword as well as the power of the purse. Additionally, it exercises the power to tax, as well as the power to spend with a corresponding claim to legislative sovereignty. It distinguishes itself from other systems of rule by its claim to be above the law. This is in the very specific sense of being the supreme source of law itself, and responsible for its administration and enforcement.

This is a far more radical 'principle' than the traditional rule that the king or ruler is not bound by his own commands, meaning that the king's laws cannot be invoked against the king himself. Further, there is the presumption of immunity from sanctions for transgressing the law. It does not say anything about the state having no legal right to bind anyone by its mere commands, when these are not founded on justice but designed to maintain or restore adherence to law. In effect, the law is what the state decrees, together with a subjective and selective determination of justice. It is hereby contended that justice derives more from social norms, values and expectations rather than the dogmatic precepts that the state might impose.

Regarding the state's regulatory and interventionist role, labour legislation has moved from the notion of conferring rights on workers to one of regulating the business environment. This is done by balancing management autonomy and worker protection. The regulatory

[262] Dundon & Rollinson *Understanding Industrial Relations* (2011) 169.
[263] Ibid.

mechanism leaves a scope for common-law principles and judicial decisions, although both are inadequate. Regulation can therefore be described as state intervention in private spheres of activity to realise public purposes.[264] As a result, there is the public perception that the state establishes a specific legal framework for achieving specific regulatory objectives. One of these is labour legislation, which can be seen as not being a reaction to any specific demands from the society that it seeks to dominate, regulate and administer. This is done through the medium of its institutionalised agencies.

4.6 The institutionalisation of the state

4.6.1 Conceptualising institutions

The institutionalisation process becomes the key to a general understanding of the state and its adjuncts in action. According to Crouch, an institution is constituted as–

> patterns of human action and relationships that persist and reproduce themselves over time, independently of the identity of the biological individuals performing within them. Sociologists have long understood such a concept, but much of this earlier history has been ignored by recent political scientists and others who have come autonomously to the idea of the institution n as they sought to convey the idea of behaviour being shaped and routinized, fitting into patterns, which are not necessarily those that would be freely chosen by a rational actor needing to decide what to do.[265]

Institutions are created to limit transaction costs by engineering rules that condition conduct and also by creating rewards and sanctions systems so as to offer incentives that render the implementation of agreements easier. Institutional change is what explains the history of every society. It happens incrementally and can be positive, negative or regressive, depending on the environmental costs and incentives. However, all institutions do undergo change. Institutional change is defined as change in an entire class or organisation. Institutional change, at its deepest level, refers to changes in the ideas that define and govern structures.

As these ideas change, rules and practices shift as well. Even in the allegedly stable industrialised countries, the institutions of labour relations are gradually transformed from

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[264] Ibid.
[265] Crouch *Capitalist Diversity and Change: Recombinant Governance and Institutional Entrepreneurs* (2005)10.

market-constituting institutions to market-dependent variables. Change is not the only movement of the core–periphery boundary. It is also deployed to subjugate collective bargaining and workplace co-determination. In consequence, firm-level economic calculations may subvert the intentions of the prevailing labour law.

Institutions do not only disintegrate; they also become passive and ineffective with time or as a result of concerted onslaught. Institutional atrophy with regard to practical labour law results from the effects of flexibility in the labour law regulatory framework. An example is the ineffectiveness of institutionalised labour standards in a hostile environment. Labour market flexibility, which is essentially an approach to public policy that places almost exclusive reliance on the competitive and simulated market mechanisms, has also, in its own way, significantly impacted on the dynamics of labour law and relations.

In effect, legal concepts such as labour law, when formulated, create institutions through the functionally complex process of identifying patterns of socialised conduct and, by analysing them within an ideological context, produce a normative institution such as applies to the state, regulation or the employment contract. Private organisations engage in jurisdiction shopping to find the most sympathetic regulatory environment, which then dictates the location of labour markets and entrepreneurship.

At times, political institutions that determine values and ideology are mistakenly identified as the state rather than as its mechanisms.[266] The state exists to harness, guide and stabilise the contradictions in society as the political leader of that coalition of peak groups. As said, it decides who gets what, when and how. Through legislation and policy, the institutional state has evolved into a centrist creature, capable of determining, via mobilisation, acculturation, conditioning and other means, the socio-economic direction of the country. Precisely because of its roots, it also becomes reluctant to change and responds, in a bureaucratised, deliberative manner, to social demands. Both formal and legal structures are therefore created and vested with certain attributes to assist in defining individual choices, thereby reducing uncertainty and minimising the cost of consensual transactions.

[266] Mattei op cit. 522

Government and governance are therefore the institutions and processes deployed by the state. There arises then a perceived need to adjudicate all disputes and impose coercive authority to ensure order, using regulation. Regulation is therefore the setting of limits by the state for private conduct, using its formal institutions as above as agents of form and nature of the regime. A regime implies forms, processes and values systems conducted and determined by the state. In terms of regime theory, then, the premise of regulation is the political decisions of the state within a given context of utilitarian values and features it feels have been used effectively before and so can be used again to organise public life.[267] The contradiction is that time and environment determine change, not adherence to the past and its ideology and methods.

The structural foundations of the African state therefore emanate from its colonial legacy, through a period of concentration of state power. This evolutionary path enables the elaboration of the state through the amplification of structures. This amplification results in expanded bureaucratisation and excessive rule-making and administration. Invariably, this leads to the refinement of the coercive apparatus, the refinement and reconfiguration of rule-making processes and structures, the selective and subjective interpretation of rules, and a redefinition of the parameters of political activity.[268] The state in action therefore manifests a degree of decision-making authority through specific structures. The state, as 'that summation of privileges and dominating positions which are brought into being by extra-economic power becomes inured to methods of sustaining the *status quo*.'[269]

That being the case, the state becomes important for this study because, as explained, it intervenes in all spheres of social activity, creates structures, and allocates authority and functions to them. In effect, the effectiveness of state structures or institutions is a function of the state's capacity to successfully mediate in inter-group and interpersonal relations and, in this context, with regard to workplace dynamics.

The state exists to harness, guide and stabilise the contradictions in society as the political leader of that coalition of peak groups that have seen the need to collaborate to retain privileges. As the *primus inter pares* of the constellation, the state lays claim ideologically to

[267] Francis *The Politics of Regulation: A Comparative Perspective* (1993) 5–7.
[268] Chazan et al (Eds.) (1992) *Politics and Society in Contemporary Africa* 50–60
[269] Oppenheimer *The State* (1975). See McElroy 'Defining the State and Society' (1998) 48(4) *The Freeman* 223–227.

interests it perceives as public.[270] The need for the state to intervene, to lead, while politically neutralising and isolating other interest groups, flows from the logic of its developmental path. Ultimately the modern state, having evolved a national order, ceases to rely on traditional ties of kinship and loyalty for stability, as seen in the enactment of laws that demean traditional authority by turning chiefs into paid functionaries. It now co-opts deviants, rewards loyalty or punishes deviance.

The historical connection between the colonial and post-colonial states would suggest certain continuities essential to the sustaining of the state, even if the forms and approaches differ. In effect, the study agrees with Gramsci that-

The historical unity of the ruling class is realised in the state….But it would be wrong to think that this unity is simply juridical and political…the fundamental historical unity, concretely results from the organic relations between state or political society and civil society.[271]

This study concludes at this juncture that, to a large extent, the period before 1990 suggests that the post-colonial state in southern Africa would demonstrate a concern and apprehension of labour as an organised entity. This anxiety would appear to have been transmitted via the colonial state machinery, which had sought to put in place pre-emptive legislative and administrative mechanisms. These inherited modalities of control and containment helped to create a state-centred legal order largely intended to erect and sustain a superstructure of regulated stability. This is variously described as 'authoritarian corporatism'[272] or the containment of conflict and maintenance of peace through bargained corporatism.[273] Statism therefore has historical antecedents. This historical linkage can have its problems when change is needed. One main cause could be path dependency.

Government and governance are therefore the institutions and processes deployed by the state. There arises then a perceived need to adjudicate all disputes and impose coercive authority to ensure order, using regulation. Regulation is therefore the setting of limits by the state for private conduct, using its formal institutions as agents of the regime. A regime

[270] Davies *Capital, State and White Labour in South Africa 1900-1960* (1979) 27.
[271] Gramsci *Notes on Italian History see the State and the Place of Law* (1977) 99.
[272] Park, 'The Role of the State in Industrial Relations: The Case of Korea'(1992) *9th World Congress of the International Industrial Relations Research Association (IIRA)*
[273] Crouch *Class, Conflict and Industrial Relations* (1977) 34

implies forms, processes and value systems conducted and determined by the state. In terms of regime theory then, the premise of regulation is the political decisions of the state within a given context.

In effect, an examination of current trends in employment relations in the countries of study is important. In essence, examining the reform process of labour relations provides insight into how political and economic institutions are born, sustained and changed in reaction to the dynamics of forces at play in societies.[274] In this regard, any attempt to tame labour movements by the state signals the collapse of pluralism and voluntarism. The regulation of industrial relations in this regard may take various forms. The constitutive function in the state in the construction of institutions is one of them.

It is postulated therefore that the state can and should facilitate the creation and sustenance of structures and mechanisms for deliberative democracy. Theorists have suggested that modalities for deliberative democracy could enable society to meet the challenges of legitimacy. This implies effective and efficient governance and proper citizen acculturation, as well as capacity acquisition and empowerment. The benefits include the co-determination of matters relating to employment relations. This will also include the formulation, implementation, and monitoring of municipal labour practices and domesticated international standards.[275]

From the foregoing, in pioneering and energising such institutional and structural processes, the state could be erecting a platform for social discourse about labour law, labour market regulation and labour's industrial rights as embodied in international standards. The state would have then evolved from a class-conscious coalition of the elite into a desirable engine of social responsibility, accountability, justice, welfare and social relevance.[276]

4.7 Conclusion

The chapter examined the nature of the political and legal state in action, the ramifications of labour disputes, and the interdisciplinary issues it commands and thereby harnesses for its

[274] Ibid 3.
[275] Fung 'Deliberative Democracy and International Labour Standards' (2003) 16(1) *Governance* 51.
[276] Ibid.

exposition. Thus the inevitable nexus between labour disputes, relations and law becomes distinct. The most important contributions of the chapter however are not the polemics. The first contribution is the realisation of the dominant role of the state as the custodian and enforcer of legal rules. Secondly, the chapter highlights the complexity faced in any examination of labour dispute resolution in any arena and the caution that must be exercised in any attempt to objectively study the subject matter irrespective of the environmental context. Thirdly, the study reveals a state that is circumscribed by transactional costs and the prices that must be paid to nourish the coalition and sustain its predominance. Finally, there is the need to come to terms with the fact that the state cannot be wished away or rendered irrelevant in employment relations. The option left for labour is to widen its social base and linkages with other players so as to neutralise the political, economic, legal and historical supremacy of the state.

CHAPTER FIVE
State Agencies and Institutional Intervention in Employment Relations

5.1 Introduction

This chapter has two main objectives: a discussion of the theoretical foundations of industrial relations as the context within which labour law operates and the identification of the specific structures created by the concerned states to administer and oversee the sustenance of good industrial relations practice. By implication it also examines their key function of labour dispute resolution. To do this, the chapter explores the conceptual and thematic basis on which the instrumentality of the structures so created can be observed. In effect, the chapter demonstrates the need for a proper comprehension of the theoretical generalisations about industrial relations. This provides a platform or context for the discussion and subsequent assessment of the effectiveness of these structures.

In chapter 4, the study located the state at the core of the relations generated within the work environment and the forces that affect such relations. This is because such forces are instrumental in any changes in the quality of workplace relationships. It has become apparent that the state occupies an intrinsic place in the complicated web of production relations. This is irrespective of whether it functions as a major employer, rule-maker, enforcer or arbiter. The state has an inherent stake in the tenor of employment relations, because whatever roles the state chooses or is pragmatically compelled to play, it invariably assumes or is made to assume responsibility for how these roles impact on the society at large.

This centrality makes any role the state chooses to play an important constituent and thus a focus of attention. This is particularly so where labour disputes are concerned. This also includes those structures that the state creates and institutionalises for the discharge of assigned roles. This is also because the functionaries so assigned may excel in their capacity to perform such roles or they may abuse the powers conferred on them. In effect, they could be presiding over dysfunctional entities. That being so and for contextual clarity, these specific organs need to be identified. First, however, they must be properly located within the domain of industrial or employment relations.

5.2 Understanding employment and industrial relations

Given the scope of labour law's coverage, a discussion of both theoretical principles and the practice of industrial relations cannot be fettered by the claims of law as its founding and nurturing domain. It should be expected that the dynamics of workplace relations cannot be circumscribed by legalities alone. Neither can the instrumentality of law be used as the sole medium of interpreting industrial relations. Precisely because of this, industrial relations is acknowledged as interdisciplinary, covering sociology, labour economics, political science, labour law and industrial psychology, among others.

This, as a result, provides divergent analytical tools. Secondly, due to the complexity of the subject, theoretical specifications are carved for different institutions, actors and issues. These are also tailor-made for the respective explanation of phenomena like trade unions, collective bargaining, conflict and industrial citizenship. The result is that it is impossible to integrate them. At the same time, it is also not advisable to compartmentalise these living and malleable phenomena. This is why 'theoretical pluralism prevails and finds its justification in different analytical foci and objectives. The spectrum of theories applied in industrial relations consists of grand theories, as well as middle range theories and ad hoc approaches.'[277]

In this context, industrial, labour and employment relations are used interchangeably, as is the case with disputes and conflicts. There is no intention to revisit debates about such a justification as they do not ignore the centrality of labour disputes. Labour disputes are located in the environment of work where work is systematically organised, necessitating a form of socialisation process that is neither always comfortable nor desirable. The internal peculiarities of the workplace characterise it as a microcosm of society. This study adopts the position that the difficulty in dealing with independent theories for industrial relations should be seen as reflective of the variables in group socialisation. Therefore, various factors are called into play, because workers come to work with different orientations, differing drives

[277]Kaufman (ed) 'Theoretical Perspectives on Work and Employment Relations' (2004) page numbers.

and potentially irreconcilable impulses. Converging these attributes in close daily proximity can lead to unpredictable consequences.

The study therefore posits that labour relations and disputes defy a consistent, coherent theoretical platform. Therefore, conflicts become anecdotes along a narrative path. It is along this path that factors such as disputes, unionisation, and regulation become the definition instead of the characteristics. Shalev addresses this problem by pointing out the contemporary concerns with industrial relations theory.[278] The first is whether a core theory is required within a self-justifying stand-alone discipline. He concurs with Cox that, theorising is only about 'problem solving in intent, positivist in epistemology and functionalist in method'.[279]

The second concern is whether industrial relations theory should be based on assumptions of consensus and stability or those of conflict and change. The third concern is about how to advance the knowledge about industrial relations. To this end, Shalev returns to Dunlop, who is supposed to have opted to measure industrial relations from the perspective of the manner in which legal rules or outcomes reflect the realities of the objective constraints on employee and employer relations.[280] The issue then becomes one of whether a theoretical paradigm must necessarily oppose prior theorising, even when such a theory is empirically valid.

In the context of this study, all proponents of theoretical positions together weave the fabric of industrial relations as currently understood. As an illustration of the discussion above, the study locates a definition that is patently unsatisfactory. The definition proposes that the focus of industrial relations is 'all forms of economic activity in which an employee works under the authority of an employer and receives wages for his or her labour.'[281] However, assuming the employment relationship, such as there may be, is a simple direct exchange of service for remuneration, the problem will now be how such an agreement can become a relational one in terms of workplace socialisation.

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[278] Shalev 'Industrial Relations Theory and the Comparative Study of Industrial Relations and Industrial Conflict' (1980) 18(1) *British Journal of Industrial Relations* 27-43
[279] Ibid
[280] Wood et al 'The Industrial Relations System: Concept as Basis for Theory in Industrial Relations' (1975) 8(3) *British Journal of Industrial Relations* 291–308.
[281] Korcer & Hayter *Comparative Study of Labour Relations in Africa* AIAS, University of Amsterdam, Working Paper 116 (2011).

Kaufman observes that 'to a large degree, most scholars regard trade unions, collective bargaining and labour-management relations and the national labour policy and labour law within which they are embedded, as the core subjects of the field.'[282] He also quotes Rogowski as describing industrial relations to 'have developed from a conflict system into a societal sub-system which defines itself with respect to fulfilling a function in society at large, namely, to manage collective violence which can occur in the relations which can occur between industrial interest groups.'[283]

As demonstrated above, industrial relations appears to elude a precise definition. This, according to Yesufu, is because–

> the parties to industrial relations present an infinite permutation of attitudes on these matters. It is hard to achieve a consensus on the formulation of the problems which have to be faced. Agreement about how to resolve them often thus seems to be beyond reach …. The subject moves quickly, which is why an academic analysis which maintains a proper regard for practical considerations is important. The aim is to give a firm basis for understanding the underlying problems and principles.[284]

Put another way, there is no denial that the state rules through arrogating legislative authority to itself.

One result, therefore, is the constant references to the doyens such as Simmons, Dunlop, Marx and Durkheim, among others, revisiting their postulations and truncating their written propositions.[285] Ideally, all academic explorations must be aimed at fortifying the social, moral and ethical components of any human interrelationships. This then can justify a problem-solving approach with regard to the impact of institutionalised structures. These academic expositions should also not forget the need for reforms in labour policies and laws and in particular the need to ensure protective mechanisms for workers in developing

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[282] Kaufman 'Original Industrial Relations Paradigm: Foundations for Revitalizing the Field' in Whalen (Ed.), *New Directions in the Study of Work and Employment: Revitalizing Industrial Relations as an Academic Enterprise* (2008) 31.
[283] Ibid 4.
[284] Yesufu *The Dynamics of Industrial Relations: The Nigerian Experience* (1984) page no.
[285] African academics such as Yesufu, Ananaba and others acknowledge the seminal contributions of Dunlop, Thompson, Marx, Durkheim, Weber, the Ford and Taylor schools of industrial organisation. One should also not forget the efforts of the colonial-era Passvilles and Webbs and their efforts at inculcating a sense of responsible industrial relations in the British colonies.

countries, who are exposed to the machinations aimed at the re-commodification of labour. It should be acknowledged that such developments suggest that 'social systems are the products of interaction between environmental conditions and strategic choices made by stakeholders as they seek to protect and advance their interests.'[286]

In this context, the complexity of industrial relations can be summed up in the imbalance between the implementation of an organisational plan and the maximisation of efficiency on the one hand, and the maximisation of income and leisure on the other.[287] Whoever assumes responsibility for the resolution of workplace problems must be well grounded in the principles and practice of good industrial relations. In the context of this study, therefore, it is one thing to create varieties of structures that are invariably under-resourced. The actors in industrial relations constitute the key elements and ingredients of industrial relations. These key actors consist of the state, employers and their associations, employees and their unions, and they operate within an environment comprising more than policies regarding wages and incomes.

To understand industrial relations therefore is to understand the nature of these elements, their perceived and real roles, and the degrees to which their orientations accentuate any conflicting interests. It is important to indicate that 'industrial relations' is relevant only in the context of the modern market and industrialising economies. Therefore, it must be seen as the whole web of human interactions at work. This interaction is in turn predicated upon the contract of employment and how it is actualised.

This chapter seeks to identify and examine the structural elements designed and implemented in Botswana, Lesotho and Swaziland to oversee the sustaining of effective industrial relations. Their objective and subjective interpretation of relations is another matter.

5.2.1 Employment relations as interpersonal relations

This study asserts that the fragmentation of the work process further deepens the domination of the worker by the employer. This results in perpetual dependency on the employer. Exposure to the realities of work cannot depend on an externalised advocacy for greater

[286] Anstey op cit 1
[287] Ananaba *The Trade Union Movement in Africa: Promises and Performance* (1979)20

humanism within the African context. The humanisation of work relations is not a privilege but a fundamental, moral and philosophical premise for democratisation. Without humanisation, confrontation may occur.[288] The worker is intrinsically connected to employment or industrial relations. This role comes with severe handicaps which reflect the socio-economic realties of the true nature of production relations. This study indicates that constant disagreements and the absence of good faith in negotiations constitute grounds for distrust. Mistrust can stoke the fires of aggressive confrontation and industrial action. The implication is that labour disputes are not spontaneous and should therefore not be treated as such by the structures with authority to intervene and mediate.

As Salamon says:

> 'Very often, the lack of any proper theoretical conception of the nature of work in modern society, or of the interests that determine the design of work and organisation, or of the forces in society at large that determine the development of appropriate and realistic expectations invalidate exercises particularly those based on theoretical, management-biased empiricism.'[289]

This observation is a correct reflection of the current realities on the ground in Botswana, Lesotho and Swaziland, given the fact that much of the confusion of workers does not originate from the workers but from those who impose their will by domination. Domination includes the capacity to reward, but through the creation or generation of that reward by its recipient.

This supposed reward is remuneration in the contract of employment. Recognition for work done may therefore increase in relation to productivity because of the input–output nexus. Such a recognition–reward factor can only elicit obedience but not a legitimisation of the relations of domination. Thus the alienation of the worker results in tactical and instrumental compliance, which in reality is a function of market relations.[290] Employment relations have therefore come to assume a situation in which the employer impacts on the employee, contrary to the employee's interests. This carries connotations of political as well as economic power. These are some of the underlying issues in the nature of the employment

[288] Gorz op cit. 55
[289] Salamon *Industrial Relations Theory and Practice* (2001) 112
[290] Crouch *Class Conflict and Industrial Relations Crisis* (1977) 6.

contract, including the continuity of such dominance.[291] How workers have reacted to these varieties of domination is dealt with below.

5.2.2 Trade unions and labour relations

Trade unions desire a decent living standard for their members and not affluence. It is this exhibition of aspiration that translates itself into the myriad roles that labour movements are expected to play. However, what these roles are depends on whose interests are being advocated. Several roles have been ascribed to unions in general. In providing employees with a voice, unions may have an impact on society at both economic and political levels. To this extent, employee turnover becomes a barometer of 'good' management. It is also an indictment of the bad employer and, depending on the employees' intentions, a reward for a good employer. In providing a voice, unions determine the nature of the marriage between actual and desired conditions.

By demanding rules for the pre-emption of unilaterally determined labour policy by management, unions help to standardise wage rates and minimise inequalities within the labour force at large. This has the potential to redistribute income in a manner consistent with the objectives of social justice. Unions also facilitate communication between workers and employers. They operate as a source of worker power that influences management power in ensuring 'due process' through collective agreements. Whenever labour is able to organise itself into monopolies, it substantially increases its bargaining power. But, in practice, this potential has rarely been achieved, due to fierce resistance by employers and their allies.

Finally, unions have been alleged by some employers and state functionaries as exhibiting a propensity for political power and greed. But the argument here is that structurally differentiated states do not allow such things to happen. In fact, unions are a function of social cohesion. In the absence of legitimacy, fluid and volatile social conditions may invest unions with informal authority. There have been instances of union leaders riding on the crest of popular dissatisfaction to assume political authority. Realistically, however, the history of unions generally shows that leaders have never been able to manipulate workers into the

[291] Crouch op cit. 15.

revolutionary assumption of state power without a corresponding atrophy of state institutions, a general malaise and a political vacuum in need of fulfilment.

Therefore, the potential power of unions to destabilise the *status quo* may lie in the subjectively determined access to co-owned resources by the state. At any rate, union leaders are often promoted out of their unions and those who are better educated have been co-opted and awarded management positions in hitherto politically neutral public service unions. Therefore, the grasp of the complexities of state administration eludes most unions. Their major preoccupation has been with short-term economic returns on the sale of their labour power. In fact, most unions do not exhibit a capacity for political leadership.

5.2.3 The state and industrial relations

In most African countries, the state has come to epitomise the aggregation of all resources of civil society. As the law maker, it possesses a monopoly over the means of coercion in ensuring compliance with the law. The state is also an arbiter and an employer. The state pretends to be neutral but in reality it cannot be. This can be seen in instances where the state attitude towards unions is hostile and combative, as has been the case in Botswana, Lesotho and particularly Swaziland.[292] It supposedly endeavours to mitigate the conflicts between employer and employee in a tripartite agreement, even when such conflicts are often triggered by the state's labour policies. In this regard, the state is seen as a legitimate holder of public authority. In fact, its capacity as an employer is paramount. Therefore, it operates in a similar manner to any private capitalist who may bargain with worker formations.

The test of effective state intervention is its ability to put economic policies in motion within an environment of political stability and freedom without resorting to violence. Its confidence

[292] For example, in Lesotho, the Minister of Labour gazetted an Order in 1982 declaring banking to be an essential service. When the Order was challenged by the Lesotho Union of Bank Employees (LUBE) it transpired that the inclusion of the banks was effected as a result of an executive order which retrospectively included the banks with effect from 1975, when the Essential Services Arbitration Act was enacted. See *Lesotho Union of Bank Employees (LUBE) v Barclays Bank Plc & Another* CIV/APN/357/1994. In Botswana, the Minister of Labour and Home Affairs sought to amend s 49 of the Trade Disputes Act in order to include teachers and others hitherto not considered as essential via a statutory instrument subject to parliamentary approval. The legislature rejected the amendment. The government simply ignored Parliament and proceeded to dismiss the striking teachers and others. See *Botswana Public Employees Union & Others v The Minister of Labour & Home Affairs & AG* MAHLB -000674-2011. In Swaziland, the state ordered the court to convene at 9.00 pm in order to interdict an impending strike the following day. See *Swaziland Government v SFTU, SFL* Case No IC/347(02) of 08/01/03.

and sense of democratic direction can only be seen in its attitude towards the creation of meaningful facilities for diffusing tension. Where this occurs, the state is considered passive but not weak. Whether the state is passive and neutral can be determined by its relationship with the macro-economy.[293] In return, the position adopted by the state determines the tenor of the relations with workers, particularly those directly employed by it, as was demonstrated recently in Botswana.

This study observes that the state, whether passive or active, reserves the right to decide which organisations should exist and what rights, status and liabilities they can attract. For example, the state can regard unions as legal persons or juristic entities, but deprive them of real, substantive countervailing capacity through its power to define the nature and scope of their rights. The degree of restriction may also indicate the extent to which the state is prepared to go to consolidate its alliance with the interests of the dominant classes and groups in society. Thus the degree of legal constriction of the weaker elements in the workforce is not only indicative of how the state is biased but also equally indicative of the degree of confidence in the ability of the coalition to neutralise whatever countervailing force there is.

Pragmatically, therefore, unions, in seeking legal entity, also seek social and economic participatory rights. Workers try to develop enough momentum to utilise economic and ideological pressures for greater returns for economic efforts. This momentum, however, is often elusive and thus transformed into inertia due to the more dominant activities of the state. Such activities are informed by the political culture of the corporatist, political state.
Basically, this is the amalgamation of the economic, political and ideological facets of domination with the existing economic relations of domination. In simple terms, it is a modality for arresting the independence and empowerment of workers at the expense of dominant interests by ensuring that unions are subordinated to the state and to the dominant economic interests.

According to Crouch, depending on the level of economic growth and development, a successful strategy of domination must be more formalistic and active. He believes that corporatism in this context should be seen as strongly insistent on the maintenance of order. Being organicist, hierarchically structured and anti-liberal, it insists on the involvement of

[293] Crouch op cit 20.

subordinates with authority and on the maintenance of order, while being strongly monopolistic or monist in terms of political power and economic dominance.[294]

Therefore, by describing strikes as 'illegal and unnecessary' the state may not only be confirming its preoccupation with stability and safety.

5.2.4 Wages policy and industrial relations

A wage is an offer of the means of subsistence and a worker goes to work for survival. In Marxist terms, this implies both necessary and surplus labour. Necessary labour is that which determines his or her wage while the surplus is that which capital appropriates and realises as profit. Thus, a wage is equivalent only to a portion of a day's labour to which a worker is entitled only after applying labour power over a period that includes the surplus labour time. Incomes policy occupies an indispensably crucial position in the industrial relations nexus.

Von Beyeme considers incomes policy as the result of the bankruptcy of the theories explaining the distribution of income. In addition, he attributes this to the oversight of the 'magic rectangle': full employment, monetary stability, balance of payments equilibrium, and adequate economic growth. The oversight was in glossing over the political dimensions of economic growth which free wage and price formation could not accommodate. Hence the need to harmonise all these factors in a wage policy.[295]

However, in attempting to harmonise, the state intervenes with restrictive measures in the process of income distribution. This is because 'it is increasingly clear that prices and incomes cannot be influenced only through monetary measures or steering of demand.'[296]
The study contends that historical and contemporary differences may exist but the universality of certain peculiarities and reactions lend validity to the commonality of the key variables in industrial relations, such as the democratisation of industry. Industrial relations has come to assume an increasingly definitive connotation, not only of humanisation but, more significantly, participation and democratisation. Industrial democracy, according to the

[294] Ibid 35
[295] Von Beyme Challenge *to Power* (1980) 26.
[296] Ibid.

Webbs,[297] consists of three tenets or doctrines as follows: the doctrine of vested interest, the doctrine of supply and demand, and the doctrine of the living wage.

A living wage should at least ensure that the worker can survive by his or her trade and the sale thereof. This is supposed to liberate both labour mobility and competition. A 'living wage' is therefore an arbitrary determination of labour value, bearing in mind the economic, political and ideological objectives of the dominant interests. Its adequacy and fairness are equally arbitrary, subjective and questionable. In serving the ends of the state, an appeal to nationalistic sentiments may be employed. As Sir Seretse Khama said in 1971, 'it may be plausible that, as the workforce increases, the majority of new workers would have to go to the land.'[298] He went on to say that such workers inevitably migrate back to the areas of industry and would do so more actively if wages for skilled and semi-skilled workers were allowed to increase. In addition, while production in the countryside would decline, urban population growth would affect the creation of more jobs. Therefore, while people must be rewarded for their skills, they cannot be allowed to hold the majority to ransom.

Such sentimental appeals are descriptive of a situation where the normal laws of demand and supply are found normatively unsuitable for the political objectives of the state. Pragmatically, increases in purchasing power encourage consumption without savings, particularly as rising costs tend to outstrip these superficial increments.

5.2.5 Collective bargaining and labour relations

Collective bargaining should be seen primarily as an effort to acknowledge and comprehend the fears, needs, desires and anxieties of the parties. It also aims to develop the ability to inquire, negotiate and adjust jointly. However, in Botswana, the state exhibits contempt for

[297] Webb & Webb *Industrial Democracy*
(1897) 2 .In their contribution to industrial relations, culminating in the Passaville Memorandum to the British colonies (1930), they postulated various conditions or doctrinal requirements necessary for the harmonisation of the philosophies informing wage policies. The first is the Doctrine of Vested Interests, which suggests that wages should not be varied downwards. The second is the Doctrine of Supply and Demand. This presupposes that the market place should be left alone to determine the value of commodities, including labour, and the worker must not be protected but must be allowed to compete, a postulation that the state rejects outright. See s 26(2) of the Employment Act of Botswana [Cap 47:01]. The next is the Doctrine of the Living Wage, which is an arbitrary and unilateral valorisation by the dominant state. In fact, this concept does not deal with wage in real terms.

[298] Excerpt from address at the cornerstone ceremony of the Trade Union Education Centre, July 1971, reproduced in Colclough *Manpower & Employment Botswana, Ministry of Finance and Development Planning*, May 1973.

collective bargaining. While the state seeks to emphasise the advisability of collective bargaining and the principle that mutual problems should be mutually tackled and solved, it also seeks to devise mechanisms for future security and stability. Often, this is done by imposing wage ceilings instead of negotiation.[299] In effect, though the state seeks a collective and comprehensive agreement, it applies a short-term solution while laying down modalities for a longer-term perspective.

However, because the structures created are permanent, they become procedural, established, orderly, predictable and therefore corporatist in nature and practice. In effect, it could be said that the negotiation of a general agreement as to terms and conditions of employment is to labour relations approximately what the wedding is to domestic relations.[300] Thus the heart of collective bargaining is the continuous display of the capacity for co-operative adjustment. This is often in the face of the dynamic, human and risk-prone requirements of production. Therefore, strictly speaking, the collective agreement is not a contract. Rather, it is a cluster of undertakings and commitments within the broad framework of the contractual nature of production relations.

In this section, the study weaves together the ideas of the doyens of industrial relations and current theorists, enabling a better understanding of the crafting of a working definition of industrial relations. While it is clear that an effective definition must include the roles of the state, employers and employees, it is equally clear that industrial relations is such that a holistic definition is political, economic and organisational in scope. What is clear from the foregoing is that labour or industrial relations systems develop in response to situational dictates. While industrial relations practice is ostensibly intended to reduce, contain or prevent labour disputes, it actually engenders and nurtures them, depending on available factors.

5.2.6 The role of labour law

There is a perceived need for labour law to transcend the narrow boundaries of employment per se. This is because it deals not only with the manner in which work is organised in

[299] Recently, the Botswana state imposed a 6 per cent (6%) increase in wages at a time the public sector unions had submitted a base of 16 per cent (16%) around which the Public Service Bargaining Council could negotiate.
[300] http://legal-dictionary.thefreedictionary.com/collective+bargaining

today's world but also addresses the world of work of the future. This study argues that the issue becomes one of a distinction between what the law is, what it does or should do, and how it has functioned in terms of workplace disputes. It also acknowledges that labour law serves to preserve industrial peace by acting to confine and contain the manifestations of conflict that are endemic to the entire system of industrial relations.

The true function of labour law, according to Davis, is the 'preservation of the social and economic structures prevailing in society at any given moment for restraining the frictional relationship between employers and employees.'[301] This perception explains Kahn-Freund's theory of the relationship between law and industrial relations and 'negative' law as epitomising the collective *laissez-faire* of the past.[302] The study accepts that modern labour law is an admixture of terms and principles, concepts and rules of common law and statutes. It also accepts that legal rules do not redefine the employment relationship.[303] They function by influencing the legal content and effect of the relationship. Therefore, in examining labour law in the context of employment relations, it is necessary to look at both the statutory framework and the principles of contract, property and obligations and the political direction of the state.[304]

Whoever is charged with creating an atmosphere for viable industrial relations should consider the following. Accidents, fatal and otherwise, occupational diseases coupled with poor or non-existent social security, welfare and compensation mechanisms create worker insecurity and workplace volatility. Unemployment and labour market stagnation impact on aspirations and exacerbate social tension. The arbitrary deployment and relocation of labour, migrant contracts, casualization and individualisation of employment terms and conditions result in social dislocation. They also result in the fragmentation and dislocation of group and family loyalties which in turn affect existing normative standards, migrant labour practices and restrictions.

The study concludes that, in view of the foregoing, labour law as a field of study in the modern context is too fluid and dynamic to be compartmentalised for ease of discussion or reference. It defies statutory restrictions and frowns upon philosophical and jurisprudential

[301] Davies *The Functions of Labour Law* (1980) 217.
[302] Davies & Freedland *Labour Legislation and Public Policy: A Contemporary History* (1993)1-728.
[303] Freedman *The Modern Law of Employment* (1963)1-243
[304] Ibid.

obfuscation coupled with judicial imprecision and confusion. Going beyond the law and, by implication, more important than the law, is the need for voluntary Codes of Good Practice, a wider and constant open debate about the common social good, and the principle of proportionality.

Those who commercialise and perpetuate industrial feud would then have to contend with the wider public. Economic, social and political demands, coupled with public opinion and the law all affect industrial relations and by extension the tensions within the relational space. However, except as a last resort, law must be seen and allowed to function only as a subordinate rather than the dominant factor in industrial relations.[305]

5.3 Statutory and institutional interventions in workplace relations

5.3.1 Overview of the administrative structures

The labour law frameworks in Botswana, Lesotho and Swaziland have resulted in the creation of multiple structures with commonalities suggestive of the sources of their origin. That being the case, transplantation without proper awareness as to whether the nurturing environment is capable of sustaining growth and fruition may result in a wasted effort. In addition, marginal results or at best incremental spurts of efficiency undermine the cost-effectiveness of any enterprise.

However, these assumptions need to be tested by a more rigorous examination of each country. In the interim, this introductory section examines the following state agencies: the Department of Labour, the Commissioner of Labour, the Industrial Court, the Labour Court, the Labour Appeal Court, the Industrial Court of Appeal, the Labour Advisory Board, the Minimum Wages Advisory Board, the Conciliation, Mediation and Arbitration Commission, the Panel of Mediators and Arbitrators, the Director of Dispute Prevention and Resolution, the National Advisory Committee on Labour, and the Industrial Relations Council.

[305] Preston op cit. 134

What informs this examination is the fact that much state intervention in labour relations is through the agency of these organs, which have already been identified as components of the powerful public bureaucracy.

It is debatable whether institutional interventions, judicial decisions and other politico-administrative oversight mechanisms have had resounding success in mitigating the effects of labour disputes. An answer in the negative does not imply failure, but a need to identify the constraints. The following section juxtaposes the structures in the three countries in order to identify further functional, procedural and even nomenclature-related similarities. Subsequently the study will examine the ground realities and impact using these specific structures. However, it has to be recognised that, unlike state agencies, enterprises are economic entities driven by the profit motive. Their structures and organisational ethos are therefore informed by these short-term specific objectives.

Bearing this in mind, their internal structures, corporate sub-culture and interactions and the modalities thereof are informed by this capital-driven concern. Therefore, state intervention in whatever form is more often than not considered intrusive rather than constructively interventionist. The state is guided more by political concerns regarding order, stability and the *status quo*. In essence, the question still remains as to why the state sees a need for an ever-increasing role in industrial relations, a role that results in replication of state-funded structures maintained at the expense of critical social services. Some state structures are examined briefly below.

5.3.1.1 The Commissioner of Labour

This office is created by current labour legislation in Botswana and Swaziland. However, the Commissioner of Labour (COL) in Botswana has a wider area of responsibility and therefore inherent authority. He may empanel arbitrators or mediators, over whom he presides as chairperson. There are no intermediary institutions like the Tripartite Commission on Conciliation, Mediation and Arbitration (TCCMA) in Swaziland, which must precede access to the courts. The Director of Dispute Prevention and Resolution (DDPR) in Lesotho is charged with similar functions. He is a public servant, as in Botswana and Swaziland. This institution is thus replicated in two countries, while the Director in Lesotho has a different title.

5.3.1.2 The Industrial Court

Both the Industrial Relations Act (IRA) of Swaziland and the Trade Disputes Act (DTA) of Botswana provide for an Industrial Court composed of judges appointed in the same manner as those of the High Court. The functions of the courts are essentially the same in both countries as the courts in both instances are expected to be courts of law and equity. They also have independent Registrars. The jurisdiction suggests an emphasis on matters arising from trade disputes and those needing resolution in furtherance of good industrial relations. Decisions are subject to appeal to the Court of Appeal in Swaziland, where an Industrial Court of Appeal exists. In Botswana, appeals lie before the High Court. This provision should be replicated in Botswana as it is the trend. South Africa also has a Labour Appeal Court. It engenders specialisation away from the over-arching demands on the normal justice system. Essentially the courts may regulate their own procedures and proceedings, unlike in Lesotho.

The purpose of these courts is mainly to interpret and oversee the implementation of labour law so as to ensure good, effective industrial relations. Achieving this aim requires a harnessing and harmonising of the roles of all the other actors who may be both centrally and marginally connected to labour law and relations. Since the judicial framework, the philosophy and the expectations are common, the Industrial Court system becomes an attractive instrument, provided this instrumentality can be used to enhance social justice.

5.3.1.3 The Labour Courts

Lesotho has a Labour Court system up to appellate level. Swaziland and Botswana do not, but rather have Industrial Courts that perform the same functions. These courts are also courts of law and equity and are intended to perform adjudicatory and review functions in the search for effective industrial relations.

5.3.1.4 The Labour Advisory Board

Labour Advisory Boards (LABs) exist in Botswana and Swaziland, while the National Advisory Committee on Labour (NACL) is found only in Lesotho. The two structures appear to be performing the same or similar functions, albeit with different reporting and oversight

mechanisms. The Labour Code of Lesotho provides for a National Advisory Council of Labour (NACL). Both the IRA of Swaziland and the Employment Act (EA) of Botswana provide for a Labour Advisory Board. While the duties of the LABs are now essentially the same, Botswana was, until the amendments in May 2004, rather vague about the composition, powers and functions of the Boards, which are covered in detail in the Swaziland IRA and the Labour Code Order in Lesotho.

The IRA of Swaziland places the following duties upon the Board: the incorporation of ILO Conventions and the preparation of reports and memoranda submitted according to the requirements of articles 19 and 22 of the ILO Constitution. However, the Board is composed of 18 members, with six senior government officials, and six representatives each of employers and employees, or their alternates, with the Commissioner or his Deputy as Chairperson. In effect, this may translate into votes of 12 against 6, leading to questions of disproportionality and imbalance and legitimacy, if and when worker representatives are outvoted, not forgetting the intimidating potential of this majority of the better-educated and vocal state and employer representation.

5.3.1.5 Tripartite Commission on Conciliation, Mediation and Arbitration (TCCMA)

Though there is a variation in nomenclature, these variants of the ADR approach are referred to in Swaziland and Botswana respectively, and are charged with alternative dispute resolution prior to the referral of disputes to the Industrial Court. Both are established subject to the consultation of the Labour Advisory Board, which makes recommendations, and membership consists of those recommended to the Minister.

The Commission in Swaziland receives trade dispute reports directly and is standing rather than *ad hoc* for this purpose. In Botswana, the Commissioner of Labour receives the reports and determines who is suitable to mediate or arbitrate, as the case may be, from a pool of full-time and part-time appointees. The Commissioner may intervene where he apprehends a dispute and delegate the resolution of the dispute to a panel member or a board chaired by him. The two Acts provide detailed procedures for effecting alternative dispute resolution which, in their letter and intent, do not differ, and indicate a preference for compulsory statutory dispute resolution.

5.3.1.6 Conciliation, Mediation and Arbitration Commission (CMAC), Panel of Mediators and Arbitrators, Industrial Relations Council

The Industrial Relations Council in Lesotho is a tripartite body established to oversee dispute prevention and resolution. It is intended to lend legitimacy to the system and to ensure that the social partners, as beneficiaries of the system, have an important influence in seeing that the system works effectively. It is composed of three representatives each from employers, employees, the government and the Permanent Secretary of the responsible ministry. The Industrial Relations Council is a Lesotho brand. Its scope and functions are similar to the Conciliation, Mediation and Arbitration Commission of Swaziland, which does not have the IRC's powers. In Botswana, the COL combines all these roles under his portfolio as a Departmental Supervisor.

5.3.1.7 Joint Negotiation Councils (JNCs), Joint Industrial Councils (JICs)

In Swaziland, a JNC may be formed by an employer, employers' organisations, or one or more registered trade unions. The purpose of a JNC is to negotiate on behalf of employees and employers within an industry where it considers itself sufficiently representative. Once the employers' organisation or trade union has satisfied the requirements, a notice is gazetted for the purpose of establishing a JNC. The same applies to the JIC under the Botswana Trade Disputes Act and the Bargaining Council under the Public Service Act.[306] The difference, however, is that where the COL under the TDA refuses registration of a grievance, the only recourse is to the Minister. In Swaziland, any aggrieved person may refer the matter to the Industrial Court or the TCCMA. As a JIC is important negotiating machinery from which collective agreements emanate and disputes of rights evolve, it is critical for the court to determine objectively the grounds for the non-establishment of a JIC rather than leave this to the political discretion of the Minister. The provisions of the IRA and the TDA regarding disputes procedures, unlawful industrial action and the enforcement of collective labour agreements are not substantially different. Thus, content and format are identical and reconcilable. They could also replicate the problems caused either by acts of omission or commission in the drafting.

[306] [Cap 26:01] Act 30 of 2008.

Organs such as an Essential Services Commission in Swaziland and a detailed, crafted role for Mediators and Arbitrators in Botswana are aimed at the same goals. The list of essential services is the same by industry or service. For reasons given earlier, a body comprising equal numbers of representatives from the government, employers and employees is ideal for overseeing the broad range of issues concerning essential services. Currently, the absence of an essential services commission in Botswana has led to serious departures from statutory procedures.

5.3.1.8 Minimum Wages Advisory Board (MWAB)

A key factor in industrial relations is wages and their determination, since many worker pursuits are focused around socio-economic issues, such as a living wage. Thus such a body plays an important role, particularly in the fixing of statutory minimum wages. Such bodies are charged with the annual review of wages policies and orders. In Swaziland, the COL is charged with the fixing of wages in consultation with representatives of both employers and employees. From the viewpoint of the state, wage leadership is an essential tool in labour retention, even if the process is arbitrary. Assuming the process in Swaziland is collaborative and bona fide, it could constitute a practical way of reducing labour disputes. The Industrial Court is charged with resolving questions regarding wages. In Botswana, there is a standing Minimum Wages Advisory Board. A listed statutory category for which the Minister shall fix minimum wages is provided. There is also a Wages Advisory Board comprising equal numbers of representative from employers, the trade union Federation, government and the public.

5.4 Conclusion

This study has demonstrated that, in Africa, the state is not yet in retreat. The dominance of the state is a pragmatic choice perpetuated by the coalition, particularly the political leadership. The state has, generally, continued with the colonial legal framework, tinkering only marginally and incrementally in response to both internal and external influences.

In essence, the key institutions in labour dispute resolution, while structured differently and designated equally so, functionally converge in terms of aims and goals. There is still a need to look at their evolutionary path, historical antecedents and the impact of foreign influences

on their creation, relevance and sustainability. One could then determine the pressures brought to bear as a factor in the search for results in these legal systems.

All three countries have provisions for workplace councils as engines for collective bargaining and worker formations and their roles in collective agreements. However, statutory compulsory registration of agreement and compliance with procedural and substantive issues do not appear to have diminished disputes of right or interest. This is probably because they do not always reflect a realistic appraisal of bargaining positions. Registration compels compliance and sanctions within a regulatory framework, but not necessarily internalisation and legitimisation. This is particularly so where a bureaucratic and elitist union leadership discards the value of grassroots mandate for financially lucrative arrangements with employers.

At the moment it would appear that, as the three countries have indicated, there is a greater reliance on alternative dispute resolution (ADR) mechanisms. It is on record that the Labour Departments are poorly equipped. There is a remote possibility that the state might opt for the privatisation of labour dispute resolution unless the overall goal is not justice and equity, but an indirect way of keeping workers in check. In any case, there is an urgent need for specific training for both legal and paralegal public officers. The structures and institutions for ADR envisaged need to be developed and sustained not only to reflect the duality of the duties of justice and equity, but also to prevent overloading the more ponderous and laborious court system. It is expected that internal workplace dispute resolution will be re-visited.

Such internally driven arrangements will allow in-house fire-fighting, husbandry and house-keeping to become prerequisites for internal intervention, apprehension by a statutory officer notwithstanding. It must also be ascertained whether alleged over-regulation and over-administration affect the desire of the parties to find solutions to their problems internally. Another vexatious issue for examination is that, more often than not, judicial decisions do not appear to be shaping the teleological social policy dimension of labour law and policy. Furthermore, except in a few instances, the specialised courts seem to emulate the rigidities and traditions of legal positivism and doctrinal litigation.[307]

[307] *Swaziland Government v The Swazi Federation of Trade Unions (SFTU) and The Swaziland Federation of Labour (SFL)* Case No IC 349/02, Case No IC 347/02 of 8/01/03.

At another level, it is presumed that a worker needs more than a vague sense of contentment. According to recent trends, a new worker is emerging who needs to constantly feel that he or she is participating responsibly, whether alone or in a group, in an enterprise the overall objects of which he or she can understand. The corollary is that 'a new form of state emerges, concerned with the expanded, rather than the primitive accumulation of capital, with extraction of relative surplus value from production.'[308] It is in this context of perceived marginalisation that the employee conceptualises wage determination. Industrial action or inaction is often the result of how wages policies are perceived and evaluated relative to the calculated economic returns to the worker.

This is why it becomes paramount to examine parameters such as 'employee', fair and unfair dismissal, freedom of association, the right to organise and collectively bargain, and the notion of 'essential services', among others. A logical outcome that some dismiss is the issue of industrial action or strikes. Tangentially, strikes are seen as a vent for frustration. For example, the terminologies applicable to war, boxing damages, wins, losses and casualties indicate such orientation. Employees generally resort to other devices to even out the score with management. But psychologically, these outlets only portray their frustration at being unable to intellectually articulate their perceived exploitation by the employer. It takes a lot more than legislation, rules and regulations to understand the workplace. This also applies to disputes.

The chapters that follow examine disputes in the specific contexts of Botswana, Lesotho and Swaziland. The study has identified some aspects of the employment relationship that mostly trigger disputes, which are:

- fair and unfair dismissals;
- the freedom to form and join unions of one's choice;
- the right to organise and collectively bargain, union recognition, the strike (lawful and unlawful) as a bargaining tool;
- the statutory and judicial dimensions of 'essential services' in relation to ministerial powers and statutory instruments.

[308] Burawoy, *The Politics of Production: Factory Regimes under Capitalism and Socialism* (1985) 253

These elements of the employment relationship need examination from the doctrinal perspective, the normative exhortations of the ILO, and the narrow substantive legislation. This survey ought to provide adequate insight into the workings of public institutions. This study will also cover the judiciary and, more importantly, how the institutional make-up and ideological orientation of these bureaucrats might have rendered them impervious to the subtle nuances of shop floor relations. The study suggests that such patterned insensitivity could have crystallised over time. A proper investigation might explain why such institutionalised conduct, though less costly, is an equally less efficient way of dealing with labour disputes.

Further, the functionaries of the state appear inclined to address the symptoms rather than the actual causes of labour disputes. At the risk of pre-empting the outcome of the survey, it is quite apparent that the state engineers inter-union and employer–employee friction. The state encourages the dissipation of the collective energy of workers and then intervenes. The quasi-judicial intervention by its agents and functionaries who are already imbued with anti-union sentiments further muddies the waters.

CHAPTER SIX
The Botswana Perspective

6.1 Introduction

Chapter 5 dealt extensively with the state as the dominant actor in employment relations. It became obvious that the state is guilty of stoking the fires of labour disputes, because the state creates the framework within which the relevant laws are manipulated to regulate the workers in Botswana. Post-colonial developments appear to have followed the same direction as in the past, in what one might describe as path-dependency. In effect, therefore, many of the observations, deductions and conclusions with regard to Botswana are not likely to be completely at variance with the situations in Lesotho and Swaziland. For this reason, an intensive and comprehensive analysis of the Botswana situation is deemed necessary, because this will ensure that the other two countries need not be treated as extensively with regard to detail and scope.

Chapter 6 proceeds on the basis of the core areas identified in chapter 5 as being prone to disputes. These include the concept of the status of 'employee'. The arrival of the worker begins the employment relationship, resulting in fair and unfair disciplinary dismissals and the freedom to associate and organise. In addition, the study undertakes a blend of theoretical and empirical discussion of the problematic issue of essential services, given that the state periodically tinkers with the categorisation of essential services. The chapter explores these themes objectively and analytically.

6.2 The notion of a contract of service

This section begins with the entry point of employment relations. Botswana has not been untouched by developments in the empirical development of labour law. The modern concept of the contract of employment has its roots in the traditional Roman law concept of *locatio conductio operarum*, or the letting and hiring of services. This definition, which initially applied to only the unskilled and menial worker, now has a bearing on various facets of work life in Botswana. In essence, moving away from the Roman and English common-law roots, the modern definition of the contract of employment has certain contextual implications. For

example, in the local context, it has acquired an increasingly legislative definition. This is ostensibly intended to address the perceived shortcomings of both the Roman-Dutch and English common-law approaches. The employment contract as legally defined is supposed to be a consensual agreement in which the servant or employee (*locator operarum*) avails the employer or master of his or her person to be used in the performance of services as may be assigned by the employer. This definition is loose and designed to advantage the employer, regardless of how others might define it. In this context, the employee offers his or her productive capacity for hire under imposed conditions, over a specified period of time in return for remuneration.[309]

This definition is encapsulated in the Employment Act[310] of Botswana, which provides the prescriptive environment underpinning employment relations. The scope of the Act suggests that, within the framework of formal employment, there is ample statutory protection for all parties even if implementation and enforcement may be lacking This Act defines an employee as a person who enters into a contract of employment for the hire of his or her labour. A casual employee is defined as an employee whose contract exists for a period of not more than 12 months and whose working time is limited to three days or 22½ hours per week.[311]

Each of these categories of employee is supposed to be eligible for basic pay based on a rate of payment. This includes payment in kind. Payment is made by the employer for work done or services performed during hourly, weekly, fortnightly or monthly periods excluding all other remuneration. Within the context of the Act therefore, employees are statutorily covered and their services may not be terminated without just cause. According to Dingake,[312] it is a criminal offence for both parties to contravene the provisions of the Employment Act.[313] This was the position taken by the court in *Kgosiemang Mogopi v Nat*a *Timber Industries (Pty) Ltd.* [314]*In casu,* it was decided that-

[309] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 at 56–57. See also *Finams v Derek Grace* IC 26/96.
[310] [Cap 47:01].
[311] Part 1 of Cap 47:01.
[312] Dingake *Individual Labour Law in Botswana* (2008) 19.
[313] Section 37 of [Cap 47:01].
[314] IC 194/96

> [w]hilst the Court accepts the general principle that anyone may renounce a law made for his special benefit, such renunciation is not permissible where matters of public policy or public interest are involved.[315]

However, labour legislation has demonstrably continued to be skewed towards the notion of contractual obligations and the prerogative of the employer to structure the work relations as he or she deems fit. Therefore this notion is not grounded in a conscious desire for equity even though there is no equality between the parties. Even in the event of state intervention, the premise is generally the supposed private contract between two consenting adults.

An 'employee' as defined excludes members of the Botswana Defence Force, the Botswana Prisons Service, the Botswana Police Service and the Local Police. Currently, the definition includes civil servants and those in local authorities deemed as having agreed to (a) place the whole of their time at the disposal of the government; and (b) waive the right to additional remuneration for any work performed in an official capacity as required by a competent authority.[316] It is obvious that the performance of this labour to satisfy the contract must attract a degree of effective control, either in the course of performance or spanning the life of the contract, as the case may be.

A servant therefore becomes a person subject to the control of his employer 'as to the manner in which he shall do his work'.[317] Such control includes hiring and firing. This statutory provision does not provide the servant with reciprocal control over the employer as to the manner in which he or she shall provide the work. While the Employment Act imposes a duty on the employer to provide work in terms of the contract, it does not confer on the employee the right to demand that he or she be given work.[318]

Thus the employee is not afforded legal capacity to sue for damages for breach of contract and the wasting of time, deprivation of his or her earning capacity, and other related issues. The employer is only obliged to pay wages covering the period. In effect, the employee can only 'control' the employer to the extent of demanding payment. The principle of reciprocity

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[315] Ibid
[316] Section 37 of [Cap 47:01], read with ss 1–2 of part 1 of the Preliminary Trade Unions and Employers Organizations Act [Cap 48:01].
[317] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 AER 433 per Mackenna J.
[318] Section 16.

whereby the employee can seek compensation for time wasted if the employer leaves him or her idle has never featured as prominently as the power vested in the employer.

Several methods have been utilised to determine the status of an employee. In *Francis Dola v Cecilia John*,[319] the 'multiple test' determination of who is a servant was adopted. This test covers (a) the recruitment and selection of the employee; (b) powers of discipline; and (c) control over wage determination. The capacity to undertake these *vis-a-vis* the employee implies a super-ordinate position whose inherent characteristic is the element of control. The determination of a servant's status has also been implied, if one accepts the full meaning of the multiple test in Botswana which will extend the provisions of the Employment Act.

In the true meaning of employment, the terms of the Constitution and also the Public Service Act, the Director of Public Service Management is an employee delegated and designated as an appointing authority. He determines, among other things, the conditions of appointment and terms of service, recruitment, administration, the structure and assessment of salaries, discipline and staff welfare. He exercises these functions over subordinate public officers. Such differentiation, while asserting the control function, also results in the relegation of lower level officers to the status of mere public servants. There is no all-purpose definition of what constitutes an employee. However, some of the indicators include the form of the contract, the method of payment, the intention of the parties, and the supply of all materials to enable the employee to deliver the service.[320]

The status of employee may also be determined by the 'policy approach'. This covers the following areas: (a) taxation of income as an employee; (b) eligibility for compensation under cover of the employer's duty to provide security against injuries incurred 'out of and in the course of' employment; (c) capacity to enjoy statutory rights as an employee, such as resort to the Public Service Commission or a Labour Officer in the event of unfair dismissal; and (d) the enjoyment of returns by way of wages rather than fees or profit This approach is well demonstrated by *Young & Woods Ltd v West.*[321] In this case, a worker was persuaded to opt for payment as a self-employed person rather than as an employee. In a contested dismissal, he was allowed to seek redress as an employee.

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[319] [1963] INMLR 58 Kaduna High Court, Nigeria, 1974.
[320] *Sigwele v Botswana Life Insurance* (2000) 2 BLR 331 (IC).
[321] *Young &Woods v West* [1980] 1 R. Law .Review. 201 CA.

On the other hand, the 'non-policy approach' emphasises the factual situation. Using the same *Young* case as example, the question arises as to whether the respondent, Mr West, a skilled sheet metal worker, was factually self-employed, or whether the status of a contractual relationship was formally agreed upon and seen to be so. Further, whether the return on the application of labour power was remuneration, service fees or a commission attracting appropriate tax. Other questions that will arise logically will include how the hours and terms of work were decided, and by whom; whether one of the parties has the right to discipline and supervise the other regarding when and how work should be undertaken; and whether the performer supplied his or her own resources and capital in terms of tools, transport and even extra personnel.

This factual determination was applied in *Morren* v *Swinton and Pendlebury Borough Council.*[322] The resident site engineer was appointed and paid by the Council but was seconded to and given instructions by a consulting firm. The issue was whether he was entitled to superannuation as a local government employee. The court held that, although the firm was not subject to direct control, it was an agent of the Council and therefore the engineer was a servant of the Council. The legal status of a worker can also be determined with reference to his role within the organisational structure. Thus it was ruled in *Stevenson and Others v McDonald & Evans*[323] that a servant must be 'part and parcel of the organization'. The test here is thus the degree of integration and involvement in the employer's enterprise.

Normally, a general employer of regular services is deemed to owe duties of a personal nature only to a servant, although such a servant may, occasionally, be under a special employer. Therefore, although the owner of a machine hires it out to another with the services of his operator, his primary responsibility for the operator is not waived. Where A works at location Y without pay on the instructions of B, primary liability remains with B since B retains control over A. In *Rotimi v Adegunle and Another*,[324] it was held that the appellant, who was injured in a hired vehicle driven by the respondent's driver, was correct in suing the vehicle owner on the basis of vicarious liability. In effect, where compensation of a

[322] [1965] 2 AER 349.
[323] [1952] TLR 101.
[324] *Alhaji M.O. Rotimi v Adegunle and Another* [1959] 4 FSC 19 Nigeria.

third party is traceable to another, the person who creates the conditions for the compensation becomes a servant. In conclusion, the status of a worker is not only important but crucial.

The status of a worker affects his or her returns on labour and compensation in the event of injury and also his or her entitlement to separation awards. The Employment Act of Botswana makes no provision for the unfettered prerogative of unilateral change in the terms and conditions of contract. Impliedly, while such perceptions may inform the quality of work place relations between employer and employee, its very nature can trigger disputes. The Trade Disputes Act of Botswana defines disputes of 'right' as those arising from an illegal infringement of rights flowing from statutory law. This covers collective agreements, individual employment contracts, or the conferment of benefits to which the claimant is legally entitled.[325] The negative rights attendant on these include dismissals, suspension, retrenchment, re-engagement, recognition or otherwise of a workers' organisation seeking to represent employees or whether a statutory dispute does exist as a matter of fact and law.[326] The Trade Disputes Act also classifies disputes as those of 'interest' implying grievances over the creation of new terms and conditions of employment or the variation of existing terms and conditions of employment.

The common thread running through this nexus is trade disputes. These are defined as an alleged dispute, a dispute between unions, or a grievance.[327] For example, in *Moyo v Kgolagano College,*[328] the Industrial Court observed that, while employment conditions may change to sustain the organisation and are thus subject to unilateral amendment as part of the employer prerogative, these conditions must be seen to be necessary, fair and reasonable. Thus, if a contract provides for a notice period of three months or three months' salary in lieu of notice, the purported renewal of such a contract replacing the notice period by the employer with one month's notice or one month's salary in lieu of notice, while retaining the employee's obligation to give three months' notice or payment of three months' salary is not only unfair and unreasonable, but also unlawful in terms of s 19*(a)* of the Employment Act.[329]

[325] .Trade Disputes Act [Cap 48:02] Part 1 –Preliminary (s 2)
[326] Ibid.
[327] Part 1 preliminary [Cap 47:01] No 6 of 2008.
[328] IC 33/95.
[329] IC 33/95.

The *Botswana Railways Amalgamated Workers' Union and Botswana Railways* is a case in point.[330] In this instance, the union alleged discrimination by the management in the creation of two separate bands of station master after a rationalisation and restructuring exercise in 1996. Some station masters were graded at band 8. A complaint by the Chief Traffic Officer resulted in some from band 6 being moved to band 8. The rest were left on band 6. The complainant station masters did not question the integrity of the rationalisation and restructuring consequent to a job evaluation but wanted all station masters to be on the same band. The court ruled that their dissatisfaction was not the result of a denied right but of a perceived entitlement, although band levels were based on station size and levels of responsibility at the respective stations. In effect, the position adopted by the management was fair, valid and lawful within the ambit of their prerogative to determine organisational structure.

In chapter 2 of this study, it became clear that the concept of employment emerged from the era of serfdom, through wage earners to current employees under the notion of a contract of employment or a contract of service. This differs from the individual contractor *(locator conductio operis)* hired for specific service delivery in return for a specific fee as pre-determined. In essence the Employment Act is a state-imposed regulatory mechanism. It provides for the appointment of a Commissioner of Labour and Labour Officers. It also provides for a Minimum Wages Advisory Board and a Labour Advisory Board. It also deals with provisions related to recruitment, the prohibition of forced labour, the protection of wages, rest periods, hours of work, holidays, the employment of young persons and children, and other conditions of work.

6.2.1 Termination of the contract of employment

The purpose of dismissal is not to allow employers to dodge their responsibilities. This is why the Employment Act makes certain provisions with regard to unspecified periods of time (subject to notice). The first is the termination of contracts of employment without reference to time. Secondly, the payment of daily wages in daily-rated or casual working situations can signify the termination of such daily engagements. Termination can occur even if notice is given in a situation where work period exceeds a day, but is less than 21 hours a week.

[330] Unreported.

Thirdly, in the event of periods exceeding a day but less than a week, notice shall be a day. Fourthly, in the event of wages payable for periods of work less than a week, the notice shall be equivalent to the period worked. Fifthly, if an employee has worked for not less than a week but continuously for two or more but less than five years, the length of notice shall be two weeks. Lastly, if the period exceeds five years but is less than ten years, notice shall be one month or six weeks if over ten years.[331] It should be noted that equitable arrangements that do not jeopardise the employee situation are deemed lawful.

However, under s 19, where there is no reference to time, either party may give notice according to the terms, or pay the other party a sum equal to basic pay accruing over the minimum lawful period of the notice. The employee, without waiting for the notice periods to lapse, may also pay the equivalent basic pay covered by the notice period to the employer concerned. The position with regard to the termination of contracts during the probation period is quite clear. Probation period itself is pegged at three months for unskilled employees and twelve months for skilled employees. Though it attracts 14 days' notice, neither party is required to give any reason therefore.[332] In real terms, as a period of adaptation, orientation and evaluation, it makes moral and occupational sense for the employee under probation to be informed as to the grounds for his unsuitability.

In s 23 of the Employment Act prohibits dismissals on certain grounds. These include an employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or, with the consent of the employer, within working hours.[333] This also covers the situation where the employee seeks office as an employees' representative, or where the employee makes a complaint in good faith or participates in proceedings against the employer involving an alleged violation of law. Finally, this also covers a situation where the employee suffers prejudice on grounds of

[331] Section 18.
[332] Section 20. See the Industrial Court case of *Mosedame v Institute of Development Management.* IC/ [29/97] (CA)
[333] Motshegwa was an employee of the Council. At same time, he was the Secretary General of his union, the Botswana Local Authority and Allied Workers Union (BLAAWU). As result of this, he was seconded to the umbrella Federation. The Council refused to pay his salary. Subsequently, the court ordered his salary to be paid. The Council then instituted an in-house case of insubordination against him. He was dismissed after a disciplinary hearing, on the grounds of insubordination and absence without official leave. Neither the Department of Labour nor the Minister has so far questioned the conduct of the Council. See *Botswana Gazette* Wednesday (10-16 June).11 (unreported)

his her race, tribe, ethnicity, social origin, marital status, sexual orientation, political opinion, sex, colour or creed.[334]

In addition to the foregoing, the employer may dismiss on disciplinary grounds without notice if the employee is guilty of 'serious misconduct'.[335] This is interpreted to mean wilful disobedience, wilful misrepresentation of qualifications or skills, habitual, wilful neglect of duties, theft, misappropriation, wilful dishonesty, acts of violence, and harassment of colleagues. In addition, the employee may be liable to disciplinary dismissal on grounds of wilful damage to property negligently or by default regarding both movables and fixtures, wilful disclosure of trade secrets or confidential information, the inability to carry out normal duties due to the intake of alcohol or habit-forming drugs, and wilful refusal to obey safety rules and regulations. The list also includes work performance below the average standard despite two written warnings, offering or receiving bribes, and persistent absence from work without justifiable cause.[336]

It should be noted that each of these grounds can trigger a whole chain of events in the workplace. Apart from being part of the range of basic floor expectations, they are also the seed-bed of labour disputes. Precisely because of this, the Employment Act provides for what is generally referred to as 'constructive dismissal' parameters. These include employment on work 'markedly different'[337] in nature from the work one was originally engaged to do, and confined employment necessitating a 'change of residence for which no provision was made in the contract of employment'.[338] In addition, there is the issue of transfer to lower grade work, poor treatment by the employer or his or her representative, and exposure of the employee and his or her dependants to danger, violence or disease that was not contemplated as an inherent part of the contract.

The other dimension is when a dismissal is summary and fair or both procedurally and substantively fair. By definition, a summary dismissal is that which occurs when an employee breaches a material term of the contract. It presupposes both an anticipatory breach and repudiation (breach *in anticipando*). In reaction, there is the corresponding declaration by the

[334] Section 23.
[335] Section 26(4) [Cap 47:01].
[336] Section 26(4).
[337] Section 26(2).
[338] Section 2*(a)*.

employer that it is no longer bound by the terms of the agreement.[339] Fair dismissal then becomes substantive if it affects the material integrity of the terms and conditions of the contract. In effect, such dismissal must be perceived to be a consequence of the irretrievable breakdown of trust or a proper working relationship. A case in point is that of Motshegwa and the Francistown City Council.[340] The dismissal was contrary to s 23 dealing with automatically unlawful and unfair dismissals, specifically s 23*(a)*.

Procedurally fair dismissals are expected to follow laid-down procedures including general warnings, informal warnings, written warnings, final written warnings, denial of privileges, suspension, demotion, and the establishing of a disciplinary panel. In the case of the latter, the employee must be notified of the nature of offence, the date and venue for the hearing, and must be given time to prepare. In effect, dismissal, viewed as a last resort before when the relationship has irretrievably broken down. This results in separation from the payroll of the employing entity.[341] In *National Development Bank* v *Thothe*,[342] the Appeal Court held that the dismissal of the applicant was substantively unfair because he had not been given notice and had not been given the opportunity to defend himself, having been dismissed by a body corporate established by statute. In the absence of any supervening legislation at that time, the guiding document was the employment contract in terms of the Employment Act which laid down procedures to be followed in cases of disciplinary dismissal. The employee must be given notice of the relevant misconduct and afforded a fair hearing.[343] The purported termination of employment was therefore wrongful, invalid and unlawful. This suggests that there is a rebuttable presumption that the law lays down procedures for trade disputes that may culminate in dismissal.

For example, if the law stipulates that the Commissioner of Labour (COL) shall investigate a trade dispute brought before him before referring the dispute to the Industrial Court under a section 7 Certificate of Referral, this presumes active personal involvement by the COL or a

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[339] Grogan 5. Op Cit. p.75
[340] *Botswana Gazette* Wednesday, (10-16 June) .11 (Unreported).
[341] See *Popi Monyati v DCEC* (*Weekend Post* 27 June 2015 at 3; unreported). The judge held the grounds for the dismissal to be unlawful since the Senior Assistant Director was subjected to a procedurally improper disciplinary hearing without the benefit of the *audi alteram partem* principle. In holding the purported dismissal to be unlawful, the judge concluded that 'A reasonable person would come to the conclusion that Molale (the Permanent Secretary, Office of the President - PSP) was biased against the DCEC Senior Assistant Director, Monyatsi.'
[342] *National Development Bank v Thotlhe* 1994 BLR (CA).
[343] Ibid.

designated representative. The inability to comply by the COL would render such a Certificate invalid, rendering the court unable to proceed according to its jurisdictional mandate. In such a situation, matters regarding dismissal may not be placed before the Industrial Court.[344]

Similarly, the Industrial Court took the position that condonation of poor performance amounted to a waiver of the need for remedial intervention. Further, refusal to give notice amounted to procedurally unfair dismissal in terms of s 25 regarding retrenchments and s 26(4)*(i)* regarding serious misconduct terminations under an employment contract. In the *Mokaya v Moteo Condotte,* a surveyor, challenged his dismissal as unlawful in the High Court and demanded payment of six months' wages. He had been employed for 24 months. After 17 months, he was given one month's notice of termination without any prior information of breach.

First, the District Labour officer determined the dismissal to be unfair but was unable to resolve the matter, which was then referred to the Commissioner of Labour (COL). The COL issued a section 7 certificate in terms of s 7 of the Trade Disputes Act.[345] The court decided that if redundancy had indeed occurred, two new surveyors should not have been hired immediately to replace Mr Mokaya alone. The purported dismissal was both substantively and procedurally unfair.[346]

There is a general perception that the levels of organised work and the calibre of workers required renders this maze of sophisticated rules and regulations inimical, if not irrelevant, to harmonious industrial relations. For example, *S&B Construction* v *Stobbs*[347] underscores this paucity of awareness about the nuances of the law. An employer sued a deserting employee for half of his monthly salary in lieu of notice. But s 18 of the Employment Act confers a right on the employee to terminate the contract without notice by making payment. There is no reciprocal right of the employer to demand payment. Further, an employer can sue a deserting worker only for damages, not for a refund of salary. Issues such as these could be avoided if workers were educated about the relevant legislation, by both employers and shop stewards of the unions.

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[344] *Gosalamang Moroka and 112 Others v Feedem Catering Services Botswana (Pty) Ltd* 1C 137/96
[345] Cap 48:02 (now Act 15 of 2004).
[346] *Mokaya v Morteo Condotte (Pty) Ltd* HC 1994 BLR 394.
[347] BLR [1979-80] 3 HC.

6.3 Freedom of association and organisation

This section demonstrates that associations of workers and employers are not simply an episode in the life of an organisation but a social phenomenon. This is based on certain jurisprudential postulations that have legislation and labour policy at their centre. Chapter 2 has illustrated a historical connectivity between the pre-colonial and post-colonial environment of organised industrial processes and the necessary socialisation of a given workforce. The dichotomy between the individual and the collective with regard to freedom of association is played out in the Webster case regarding whether it also implies freedom to dissociate. In *Young, James and Webster v UK* the dissenting judges considered the right to associate as concerning 'the individual as an active participant in social activities' while at the same time it is 'a collective right in so far as it can only be exercised by a plurality individuals'. The right to dissociate 'aims at protecting the individual against being grouped together with other individuals with whom he does not agree or for purposes which he does not approve'.[348]

It is noted that such protection of the individual does not translate into positive freedom of association. Hepple and Leader therefore challenge this juridical argument as fallacious. Their reasons are that, firstly, as a paid worker, one ceases to have that liberty in terms of who to work with, in which unit or on which shift. Secondly, the freedom not to associate is not a celebration of the death of the 'closed shop' membership recruitment approach. Most importantly, this negative freedom seeks to remove the possessors of the freedom of association from the point at which the freedom is enjoyed.[349] One cannot realise freedom of association practically as an individual alone. Assuming an individual consciously excludes him- or herself from union membership, such an anti-group individual will still expect to benefit from the concessions that others win through bargaining as a collective.

There appears to be a convergence between the principles enunciated by different international institutions regarding the desirability of domesticating international precepts, norms, practices and conventions. These are seen as subordinates to domestic rule-making. This study contends that, if indeed 'freedom of association' provides the nexus between civil,

[348] *Young, James & Webster* (1982) 4 EHRR 38.
[349] Leader *Freedom of Association: A Study in Labour Law and Political Theory* (1992) 33–34; Hepple *Freedom to Form and Join or not to Join Trade Unions* (1993).

political, economic, social and cultural aspects of human rights, then this should include the unfettered right to join a trade union of one's own choosing.[350]

Assuming this is so, the issue then would translate into a confrontation with the state regarding its discretionary authority to exclude or restrict segments of society from the full actualisation of these rights. Regardless of that, conventional wisdom has shown that there cannot be forced subscription from any employee simply because he or she benefits or might benefit from a collective agreement or the consequences of a concerted, collective stoppage of work as a bargaining tool.

6.3.1 Historical linkages

There is a historical linkage to this modern interpretation that must accompany a modern examination of current labour law regimes. The trade union collective came into existence in Britain in 1868 and obtained legal status by 1871. However, the effects of the 1875 immunities did not augur well for the control of union activity. *Taff Vale* therefore provided a new juridical redefinition of union freedoms. In *Taff Vale Railway Co v Amalgamated Society of Railway Servants Ltd*[351] liability was imposed on unions. In effect, since unions now had both juristic personalities and *locus standi*, they could be sued in tort in their registered name for officers' torts. A Royal Commission recommended in 1905 that unions should be legal entities whose benefit funds should be separated from assets against which suits could be executed. The following year, under the Trade Disputes Act (1906), immunity was granted from civil liability for acts in furtherance of a trade dispute, thus conferring the right to picket or strike.

In *Amalgamated Society of Railway Servants* v *Osborne*,[352] the government sought to curtail the politicisation of unions through the sponsoring of political parties. The Trade Union Act (1913) legitimised all forms of lawful activity, including political affiliation. In this regard, therefore, the role of the International Labour Organisation became crucial for several reasons. In the preamble of the 1946 Constitution of the ILO, it was stated that conditions of labour exist involving 'such injustice, hardship and privation to large numbers of people as to

[350] Art 11 of the European Convention on Human Rights.
[351] [1901] AC 426.
[352] [1910] AC 87.

produce unrest so great that the peace and harmony of the world are imperilled'.[353] Records indicate that the resolutions of the 1944 Philadelphia Conference were the first to elicit a response from the colonial government in Bechuanaland. This was the reiteration of the Forced Labour (Indirect Compulsion) Recommendation.[354]

In fact, what Convention 65 advocated was the mere progressive abolition of criminal penalties in dependent colonies. Article 2 of the Convention, recognised and tacitly condoned the criminalisation of breaches of health and safety regulations. It identified some areas of penal sanction which it decried. These included: any refusal or failure to commence or perform service as stipulated, neglect of duty, lack of diligence, and absence without permission or valid reason. Certain breaches were considered as attracting civil action, for example, offences against public order; labour discipline such as drunkenness, insults, assault, disorderly conduct, violent language; possession and use of company property without permission; and acts of commission and omission involving material loss to the employer.

In Botswana's legal evolution, the worst offender was the Native Labour Proclamation (Cap 64). Section 40 imposed severe penalties for all breaches of contract. This is not to say that other laws were not equally guilty. To this extent, the Southern Rhodesian government reaction is illustrative:

> The African generally has little sense of responsibility and even less of the sanctity of contract. The civil sanction is quite ineffective in that he owns little property. Moreover, the cost of civil proceedings, which would in most cases be irrecoverable, would prevent employers from instituting action.[355]

The Resident Commissioner also concluded that 'no useful purpose would be served. It is doubtful whether they would be read; and it is even more doubtful whether they would be understood.'[356]

[353] Preamble to the ILO Constitution 1946.
[354] 1930 (art 8 (4)
[355] S83/4/1 National Archives, Gaborone.
[356] Ibid.

In 1952, any immediate or early abolition of criminal penalties in the prevailing circumstances was considered as not only likely to upset labour stability but also capable of increasing lawlessness.[357] The academic question for now therefore is whether by the 1992 amendments, workplaces and the intervening state had transformed sufficiently to have positively impacted on labour legislation. The answer may be found in the following quotation. During the committee stage of the Trade Union Bill on 12 May 1969, it was emphatically stated that 'we owe nobody an apology; we are going to legislate in a manner which we think it is in the best interest of Botswana and in the best interest of the trade unions.'[358] This was stated prior to comments that trade unions were being manipulated by some 'ill-advised political fanatics' who wish to use the unions as 'a trial of power against the government'.[359]

One can see how such sentiments were reminiscent of colonial legislative developments. In other words, in ascertaining whether these signs of intransigence still persist, one is compelled to answer in the affirmative. This is based on the dominant perception of labour legislation as having been transformed from a legislative function into executive rule-making given the assertion of the rule-making prerogative by the state. For example, the definition of breaches is no different from the pre-independence framework. The remarkable departure is the criminalisation of breaches of contracts covered by essential service clauses under the Trade Disputes Act.[360] The ILO had also recommended the standardisation of wages for labour. This was roundly ignored by the state. In its quest for wage leadership, reservations were made about the general applicability of ILO Conventions in discrete, individual African situations.

In addition, differentiation between the coloniser and the colonised on one hand and social stratification between the traditional elite and commoners, it was argued, must be retained 'to safeguard African customs'.[361] Naturally, feudal practices such as perpetual indentures falling under herding, sharecropping, the employment of minors, and property rights have since colonial times, been included in the annual capping of minimum wage policies, except for hired hands in agricultural enterprises. It is therefore not surprising that, by 1960, the report

[357] Ibid.
[358] Hon Nwako MPK (Tswapong North, Minister of State) BNB 1737 National Archives, Gaborone.
[359] HANSARD 6-9/8/68 at 141,146,147,151.
[360] Act 15 of 2004.
[361] Savingram from the Secretary (HCTs) to the Secretary of State; Enquiries over ILO Convention 95 (Protection of Wages) 1565/6 of 4/5/53 S115 National Archives, Gaborone.

on labour legislation in Bechuanaland concluded that jobs performed by traditional regiments, were contraventions of ILO Conventions.[362] These public works were compulsory, unpaid and subject to penalties. With regard to ILO demands for With regard to ILO demands for vocational training and labour inspection, the office of the High Commissioner indicated that technical or industrial training was not 'in the interests of the population'.[363] In any case, industrial and commercial establishments did not need ILO instructions to operate.[364] The most serious indictment of labour practice and regulation in Botswana occurred in 1978.

This was after an ILO mission on labour legislation drafted an Employment Act, the Trade Disputes Act and the Compensation Act. In 1960 Catchpole had redrafted the Law of Master and Servant which he copied from Act 15 of 1815 of the Cape of Good Hope. This then became the received law of Bechuanaland. Catchpole later crafted out of this amalgam together with the Native Labour Proclamation. In the process, he also amended the Wages Board Proclamation 52 of 1949. Between 1960 and 1979, the only thing resembling an inspectorate of labour was the powers delegated to the Mining Commissioner under the Mines and Minerals Proclamation (s 77 of Cap 96).

Paragraph 12 of the Catchpole report considered it adequate in scope since it enabled the determination of whether 'any nuisance exists' without defining 'nuisance'. In fact, the first 25 Labour Officers were appointed only in 1966 on a part-time basis. Essentially, what the ILO mission did between 1978 and 1979 was to redraft existing regulations in conformity with ILO standards. To this extent, the intransigence of the government was understandable and could have been acceptable on the grounds of anything but political expediency.

6.4 The Constitution and fundamental rights

Section 13(1) of the Constitution of Botswana guarantees the protection of freedom of assembly and association and, by extension, the right to organise and collectively bargain. To this extent, it provides, *inter alia,* that except with his or her own consent, ostensibly voluntarily given, no one shall be hindered in the enjoyment of these freedoms. Superficially, this provision captures the spirit of all the international instruments hitherto cited. To that

[362] Committee minutes by the Development Secretary, Rhodesia Railways Consultative Committee. Dated 21/1/59. See File S 456/1/1 National Archive, Gaborone.
[363] Ibid.
[364] Ibid.

extent therefore, there is nothing iniquitous about it. Section 13(1) of the Constitution could be said to meet the expectations of art 9 of ILO Convention 87, but it is not in agreement with the United Nations' Universal Declaration of Human Rights.[365] Similarly, it is in conflict with the International Covenant on Economic, Social and Cultural Rights of 1966.

The provision in the Constitution guarantees the right to assemble freely and associate with others, and to form or to belong to trade unions or other associations for the protection of interests. Yet it also implies these rights can be curtailed or withdrawn. The restrictions in this context are those regarding assembly and association. Section 13(2) of the Constitution stipulates that anything contained or effected under the authority of any law and statutes shall be considered as duly enacted. Such laws are to be considered as not inconsistent with or in contravention of the Constitution if their purpose includes defence, safety, public order, health or morality, as defined.

Section 13(2) also condones and legitimises restrictions (without form or content) upon public officers and others.[366] It is apparent that, in Botswana, these restrictions exist specifically in relation to the formation and joining of trade unions. For such purposes, any conduct may be subjectively defined as threatening law, order, security and health. A prison officer in Botswana may not be a member of a trade union and may also not be a member of associations not established exclusively for members of the prison service alone.[367] With regard to the police service, the restrictions expressly refer to anybody or any association that wishes to control or influence the terms and conditions of work within the service.[368]

These and others regulations apply equally to members of the Botswana Defence Force. Within these contexts, it has been assumed that acceding to the terms and conditions of employment imply voluntary consent to have one's constitutional rights restricted. The freedom of contract implies the freedom to put a noose around one's own neck. The question with regard to the Constitution is whether any statutory body should be visited with the consequence of being hamstrung by a prejudicial exclusion from the enjoyment of the freedom of association and assembly.

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[365] Articles 20(2), 23(4).
[366] Section 13(2) *(a)*, *(c)*.
[367] Section 35 of the Prisons Act [Cap 21:03].
[368] Section 24(1) of the Police Service Act [Cap 21:01].

In South Africa, while the South African National Defence Force, the National Intelligence Agency and the South African Secret Service are excluded from the scope of the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA), members of the SANDF have been given the right to form and join trade unions. This was the position of the Constitutional Court in *SA National Defence Union* v *Minister of Defence and Another*.[369] Naturally, soldiers in the SANDF are not permitted to strike, but they have the right to associate, although not as a union in the conventional sense, and to collectively fight for their common welfare.

The Botswana legislature has taken almost four decades after independence to include all public sector workers, tribal administration staff and teachers under the ambit of 'employee' to enable them to form and join unions. Hitherto, this large but extremely fragmented category of workers had, according to the Constitution, been excluded from forming and joining trade unions of their choice. The relaxation of the restrictions under the 2005 amendments to the TUAEOA could be interpreted as either the latent intention of the Constitution or that the Constitution had anticipated such developments for the future that has come.[370] Given that the Constitution affirms its parental responsibility for derivative statutory enactments, it also therefore must assume vicarious liability for any excesses of these individual laws, both substantively and in application.

The amendments that have liberated certain sectors of employees from non-unionisation, albeit in keeping with emerging international trends, calls into question what informed the provisions of the Constitution at its promulgation. This is particularly so when one also considers the provisions of the Act dealing with restrictions on registration, membership thresholds, eligibility for office and other matters. This should also take into account the apparently stifling legislative environment of the past from which the country was supposed to have emerged at independence.

6.4.1 The formation and registration of trade unions

Since its formation, the ILO has been instrumental in attempting to direct countries towards approximation to international labour standards. For example, the powers of the registrar of

[369] *SA National Defence Union v Minister of Defence and Another* (1999) 20 *ILJ* 2265.
[370] See s 13(2)*(c)* of the Constitution.

trade unions to refuse registration to similar bodies (s 13(1)*(d)*) was a denial of the right of association and a contravention of art 2 of Convention 87 which stipulated that domestic legislation should not be seen as impairing freedom of choice. The definition of trade union under the received 1941 Gold Coast Ordinance 13 remains largely the same. In fact, nothing radically different has occurred between 1941 and 2004 as far as amendments are concerned. In the recent past, the establishment of a vetting board chaired by the registrar was seen as diluting the power of government through the registrar. It was believed that the discretionary control of unions was important because most were badly in need of guidance. Sentiments were expressed to the effect that a multiplicity of organisations would hamper economic development. The prevailing opinion was that trade unionism in Botswana appears to have suffered from political and ideological ties. Today, there is strategic fragmentation and multiplicity of unions.[371]

6.4.2 Eligibility as an officer

A designated officer must be an employee member of a union and not a union employee. This clause contravenes the freedom to choose officers since the termination of their employment could endanger union activity. It is proposed that anyone familiar with the trade union ought to be eligible as an officer, which is different from a paid employee of the union. Section 10(3) of the 1992 Amendment Act reaffirmed the requirement of citizenship under the 1984 Act and retained the right of the registrar to cancel applications for registration and also de-register unions when the need arises. The current Trade Unions and Employers Organizations Act prohibits union employees from elective positions since they cannot be members.[372] An elected officer must be a union member. For now, unions can operate only on a part-time basis and *ipso jure*, at the employer's or manager's discretion. The legislative interpretation of this perception of labour by government is the same today.

6.4.3 Recognition and affiliation

The prohibition of international affiliation was viewed by the ILO in 1978 as contrary to the free and voluntary association of groups and against art 5 of Convention 87. In 1969, the Attorney-General explained the limited scope of the Trade Union Act thus: 'One of the

[371] Section 56.
[372] [Cap 48"01] Section 21(3) and (4).

reasons why there are so many controls and restrictions in this Act about trade unions is the fact that trade unions are given power to do various things that ordinary bodies are not permitted to do.'[373] The debates on affiliation thus laid the groundwork for today's legislation considering it is the same government with largely the same legislators.

Perhaps one could say that government has, over the years, appeared inclined to see international affiliation as an inroad into political stability. In 1992, the Trade Unions and Employers Organization Act was amended. It stipulated that it would no longer be necessary for unions to seek ministerial approval before they could accept foreign assistance in the form funds, donations and loans. However, they are prohibited from accepting financial assistance for air, road, sea passages or scholarships.[374]

6.4.4 Finance and auditing

The ILO observed that the rigid control of union finance has been on the statute books since the Bechuanaland Protectorate Trade Unions and Trade Disputes Proclamation 16 of 1942. Utilisation of funds, it said, should be for anything lawful (as legislated in Britain since 1913) and not only for matters on an approved list. The Minister's powers under the 1979 Act were incompatible with freedom of association. The 'open-house' nature of records amounted to grave interference. The Convention on Freedom of Association is generally coupled with the Right to Organize and Collectively Bargain Convention.[375]

The Labour Relations (Public Service) Convention[376] deals with the right to organise in the public service. Its provisions expand on Convention 98 which, unlike Convention 87, does not cover public servants engaged in the administration of the state. The United Nations Universal Declaration of Human Rights provides that 'everyone has the right to form and join trade unions for the protection of his interests'. It also recognises that 'no one may be compelled to belong to any association'.[377] By extension, no one should be compelled not to join any association of his or her choice. In reality, to join or not to join a union is a pragmatic dictate. In effect, the right to form and to join a union or not may be a conferred

[373] HANSARD 12/5/69 at 24.
[374] Section 63 [Cap 48:02]
[375] ILO Convention No 98 .
[376] No 151 of 1978.
[377] See arts 20 to 23.

constitutional right. The question of which union one wants to associate with and the reasons therefor are issues of statutory conferment, which, by implication, can be withdrawn in terms of that law.

It has been suggested that the presumption of equality between the employer and employee tends to ignore other social and economic considerations. These make this equality and the implied freedom not only fictitious and hollow but also morally reprehensible. To him, the so-called bargaining power of the individual worker is insignificant, particularly in the event of greater supply than demand for labour. The implied freedom to hire and under what conditions to hire is reserved for the employer.[378] The countervailing power of the employee can only be found or actualised in his or her capacity to associate with others in a similar socio-economic situation at the workplace.

In addition, as Roper observes, the employer assumes responsibility for the programme of work. Inherent in this is the prerogative and authority and therefore the implied subordination of the worker. Such a relation explains the need for built-in guarantees against abuse, such as through the vehicle of unionisation. It explains why, when a repressive law is removed, unions exhibit a greater willingness to seek co-operation with the employer.[379] According to Kahn-Freund, society is not an agglomeration of co-ordinated equals. All societies, particularly the industrial, are structured on the unequal distribution of power. Labour law has shown that its purpose is regulating, supporting and restraining the power of those individuals or corporate bodies who exercise power. The concern is its empirical effect.

6.4.5 Liability, intimidation and picketing

Normally, coercive action, or the threat of it, is not a dispute unless it is in furtherance of matters related to the terms of employment. In this, there is very close similarity between the provisions of Botswana and Britain. A union demand must precede a dispute. Such dispute and consequent action must be connected with, concerning or about employment terms. While officers are not liable for 'actions in contemplation of a furtherance of trade dispute', they are liable for an inducement to breach of contract and, in addition, acting in a manner

[378] Damachi, "Industrial Relations In Africa" (1979) 5
[379] Roper *Labour Problems in West Africa* (1958) 12.

that is likely to 'lead to a breach of the peace'.[380] This is a loaded phrase capable of multiple interpretations and abuse. Officers are also liable for interfering by unlawful means such as intimidation, annoyance and violence within a contractual relationship.[381] Where applicable, such acts attract criminal liability.

The interest of this study lies in when such an action in contemplation or furtherance of a trade dispute constitutes the cause of that dispute. This covers the proportionality of the action taken or proposed and the result, and whether such an act is reasonably and honestly believed to be in furtherance of a strike objective. Further, there is a need to determine when such contemplated action is proportional to the dispute triggering it. It would seem then that officers of unions could open themselves to actionable suits in the event that they are not cognisant of the scope of the laws. For example, intimidation includes the threat of a breach of contract implied in the threat to strike. Therefore, a union official could be liable if he threatens a strike to secure the dismissal or reinstatement of a worker.

The acts of physical threat and abuse and restraint of scab workers during the NACLGPMWU strike in 1991 fall within this category of intimidation.[382] Whereas certain acts may not attract liability in terms of the TUEOA, these may fall under the scope of the Penal Code with regard to riots, unlawful assembly, breach of the peace or sedition.[383] In *Tynan* v *Balmer*,[384] the arrest and conviction of a union leader in charge of a picketing group was upheld. The *ratio decidendi* was that the obstruction of traffic was detrimental to the statutory objectives of picketing and at variance with the objective of peacefully persuading or communicating. Such a premeditated act was viewed as simple common nuisance.

Except under a declaration of emergency, the determination of illegal picketing and intimidation brings into question the conduct of peace officers who, in fact, are the coercive machinery of the state. Whereas in some societies peace officers are just that, in others they embody the coercive clout of the state and manifest such disposition in the face of peaceful picketing which is far removed from acts of civil unrest. In *Piddington v Bates*,[385] it was held that the law enforcement agents have the duty to prevent a breach of the peace. Where there

[380] Section 53.
[381] Section 54.
[382] Sections 54, 55.
[383] Part 11 division 1, Penal Code [08:01].
[384] [1967] 1 QB 91.
[385] [1960] 2 AER 660.

are reasonable grounds for apprehending a breach of the peace, such an officer may arrest those obstructing the performance of such duty to ensure the peace. Caution in the exercise of this discretion is paramount. The performance of such duty must be in good faith, impartial and effected without undue force or provocation.

6.5 Contextualising 'essential' service

This discourse forms the conceptual basis of the issues that need resolution regarding the degree of authority to derogate from fundamental rights such as the right to freedom of association. Having been provided for by the Constitution of Botswana, fundamental rights should have been reflected in the relevant statutes of Botswana. The concept of 'essential services' is addressed within the overall context of ILO Conventions 87 and 98. Convention 87 states that public authorities shall refrain from any interference that would restrict the right or impede the lawful exercise of the freedom of association.[386] As the Convention stipulates, 'the law of the land shall not be such as to impair guarantees provided by the Convention.'[387]

Problematically, the Convention also recognises the primacy of domestic legislation as contained in laws, awards, custom and agreements over which the Convention may claim but cannot assert an oversight in order to safeguard the guarantees in the Convention.[388] Convention 98 accepts the right of the state to restrict the police and armed forces with regard to forming and joining trade unions of their choice. These apparently contradictory statements raise important issues which are explained below.

The first is the value of the moral and persuasive authority of ILO Conventions and standards. Secondly, these Conventions must be integrated into domestic legislation via assimilation or transplantation or selective incorporation.[389] Thirdly, as part of international law, these Conventions as ratified do not appear to carry the enforcement or coercive authority in relation to municipal legislation. Comparatively, therefore, their role requires unambiguous clarification whether from a single or 'monist' or parallel or 'dualist' legal

[386] Art 3(3), Part 1, Convention 87 on Freedom of Association.
[387] Art 8(2), Part 1, Convention 87 on Freedom of Association.
[388] Art 9(2), Part 1, Convention 87 on Freedom of Association.
[389] *Moatsi and Another v Fencing Enterprises (Pty) Ltd* 2002 (1) BLR 286 per Ebrahim Carstens J.

regime.[390] A case in point is the *GCHQ* case. Here, the European Court of Human Rights (ECHR) rejected a complaint by members of the General Communications Headquarters in the UK that restrictions on their union membership had breached art 11 of the European Convention. The court said the measures were not arbitrary and thus did not violate any rights simply because restrictions on grounds of state security or public safety were permissible.[391]

This is similar to the philosophy informing essential services determination. Both the Human Rights Act and the pronouncements of the courts in the UK would suggest an unwillingness to question whether there is a primary duty owed by the employee to their contractual obligations rather than to a post-contractual creature such as a trade union. With regard to essential services in Botswana, the relevant schedule of the Trade Disputes Act identifies the following as 'essential services': air traffic control, the Botswana Vaccine Laboratory, electricity, fire, and water services, transport and telecommunications services as deemed necessary, operational services of the railways, health services, and the Bank of Botswana. Compared to the ILO understanding of core essential services, some of those in the schedule immediately appear superfluous.[392]

6.6 Labour dispute resolution in Botswana

As stated earlier, the operating statute is the Trade Disputes Act. The rationale for this legislation is the settlement of trade disputes generally, the settlement of trade disputes in essential services, and the control and regulation of industrial action. The focus is a contextualised examination of ongoing changes within dynamic systems and is intended as an analytical observation rather than as a critique, an examination of evolving processes rather than an affirmation of any particular legal system. The central concern is how the state in the selected countries has been grappling with the creation of effective, internationally comparable mechanisms for labour dispute resolution and the dominant underlying constraints.

Labour dispute resolution suggests first that within the environment of work and work-related human interaction, disagreements are bound to occur. These may be at the level of

[390] *Botswana Land Boards and Local Authorities Union v The Director of Public Service Management* Civil Appeal No.CACLB-043-11 /IC Case No. IC UR 13-11
[391] *Council of Civil Service Unions v UK* (1988) 10 EHRR 269.
[392] Ss 2 and 49. Trade Disputes Act [Cap 48:02]

interpersonal problems. Disputes may also cover matters seriously affecting the integrity of the contractual relationship. Trade disputes deal with, among other things, a dispute between unions, a grievance or any dispute over the interpretation and application of any law relating to employment, the terms and conditions including physical conditions of employment, entitlements arising out of or within a collective agreement, dismissals and other forms of termination, or the recognition or not of bodies seeking to represent employees in the determination of issues pertaining to work.[393] The legal environment of dispute resolution is therefore necessarily entwined with the regulation of conduct within the wider society and industrial relations values. Labour law as the enabling environment is therefore defined as deriving from common law, social legislation, codes of practice, public law, administrative structures and the courts.

The inability to prevent, contain, manage or successfully resolve labour disputes could thus be traceable to the persistent refusal to embrace relevant international labour standards. This is in spite of the fact that these standards are a referent point for most grievances that trigger explosive trade disputes. Put differently, international labour standards, where adopted, should significantly minimise workplace conflict. Where certain countries have undertaken significant reforms towards alignment with these standards, they should, by implication, experience the beneficent effects of such reforms. If they do not, then the universal applicability and efficacy of these transplanted standards become questionable. The receiving environments may themselves then be perceived as not sufficiently conducive to certain expected changes on the ground.

Along the spectrum of power relations, one resilient and intransigent element underpinning labour disputes is the often dehumanising commodification of labour.[394] State-driven industrial relations can be seen as a process of structuring the labour force in general into a stable atmosphere, and this derives from the logic of capitalist development.[395] In sanctioning compulsory dispute resolution, the state assumes a defensive posture on behalf of the public in labour relations. By curtailing strikes and other disruptive manifestations of dispute, the

[393] Section 2(1) of the Trade Disputes Act (Botswana); s 4 of the Industrial Relations Act; s 3 of the Labour Code Act (1999) as amended (Lesotho).
[394] Beatty *Labour is Not a Commodity: Studies in Contract Law* Reiter & Swan (eds) (1980) 300.
[395] Landbury & Verevis *The Future of Industrial Relations, Global Change and Challenges* (1994) 5.

state contains conflict and maintains civil peace.[396] More importantly, by legislating over all spheres of employment relations, the state steers labour relations in in its preferred direction, using the law as an agent to regulate the parameters of workplace relations.[397]

6.6.1 The administrative and quasi-judicial role of the Commissioner of Labour

The Commissioner is empowered to intervene as and when needed to pre-empt harm to people and property.[398] In terms of s 6(3) he or she also has authority to mediate or cause mediation to be effected, to help parties reach a settlement by their own efforts, and to incorporate such settlement in the terms of a collective agreement. He or she may delegate functions to a labour officer and is assisted by labour officers defined as public officers. The Commissioner is empowered by s 6(5) to delegate functions such as the effective realisation of training and advice, designing in-house procedures, the recognition of unions, designing collective agreements, codes and procedures, and assigning mediators.

The procedure for referrals is that the recipients of the grievance are the Commissioner and labour officers. Disputes regarding the termination of contracts of employment must be referred 30 days after their termination date. The other party is then served. The Commissioner or his delegate must formalise disputes about oral terminations or grievances on behalf of illiterates. He or she may assign referred disputes to a mediator from the panel in terms of section 4. The Commissioner or labour officer then arranges a venue, a time, and a date of first contact, and informs parties in writing. The direct referral for arbitration occurs where a collective agreement or the Trade Disputes Act so stipulates. These issues are addressed in section 7.

The mediator's role is addressed in s 8(1). He or she must undertake the following: the mediation of disputes, the extension of time subject to an oral agreement or in terms of a collective agreement. In the event of his inability to mediate successfully the Commissioner of Labour may refer the matter for compulsory arbitration where necessary or directly to the Industrial Court. The Mediator together with the parties determines the modalities and

[396] Bellace 'The Role of the State in Industrial Relations' (1992) Proceedings of the 9th World Congress of the IIRRA Sydney .
[397] Se-II-Park "The Role of the State in Industrial Relations" The Case of South Korea" (1992) Proceedings of the 9th World Congress of the IIRRA.
[398] Section 62*(b)*.

procedure for mediation within the parameters of s 7. The jurisdiction of the mediator includes the permitting of a justifiable condonation and the dismissal of a referred dispute where the complainant absents himself at a mediation meeting without justification. The Mediator also has authority to: give a default reward if the respondent fails to attend a mediation meeting, reverse (justifiably) any dismissal of a referral or default award, recommend a settlement, make an advisory award if so requested or if it will promote settlement, and effect a final determination in the event of a correct referral or date of referral.

Provision is made for appeals against the decisions of the mediator to the Industrial Court regarding the jurisdiction of the mediator, the refusal of condonation, the reversal of decisions to dismiss referrals, or the reversal of default awards. All proceedings and averments shall be confidential and a mediator may not appear in any legal proceedings as a witness. In the event of a failure to mediate, a certificate of failure is issued under s 8(11). This may be issued by the mediator before the allocated period expires if there are no prospects of settlement, which shall enable either party to proceed to the Industrial Court. The mediator shall continue to exercise his or her functions until a dispute is settled, by showing active interest and contributing in any way, including the methods provided for in s 51.[399]

The Minister, in consultation with the Labour Advisory Board, may publish Codes of Good Practice, policies, guidelines, model agreements, statistics of mediation, arbitration and adjudication results, and case databases and annual reports. An Industrial Relations Code of Practice is designed by the Labour department in collaboration with the Employers' Federation (now called Business Botswana) which is to be consulted for assistance. A mediator in a dispute of interest shall, where a strike is looming as a result of failure by the parties to agree, reach an agreement on the rules to regulate an intended strike or lockout and any conduct in furtherance of same. This shall cover, among others, provision of minimum services, the use of replacement labour and picketing.

6.6.2 Functions of the arbitrator

Arbitration is defined in s 2 as dispute resolution involving one or more neutral third parties,

[399] Section 51 The Trade Disputes Act provides that the Minister, after consultation with the Labour Advisory Board may publish Codes of Good Practice, policies, guidelines and model procedures and agreements to guide employers, employees and their respective organizations.

agreed to by disputing parties. The arbitrator's decision is binding on such parties. Referral matters are settled by means of a mutually agreed method or by redirection by the Industrial Court to the Commissioner. In that event, the Commissioner is to proceed according to a currently non-existent s 4.In terms of s 9(3) to (7), the arbitrator's functions include the following: to mediate before arbitration if prospects exist regardless of earlier mediation, to attempt mediation before arbitration in all cases whether chosen by parties or not, to conduct business as deemed fit with minimum legal formalities but substantive integrity and to allow evidence, witnesses, cross-examination, and addressing of concluding arguments by parties.

The decisions of an arbitrator shall have the same effect as an award by the Industrial Court or the High Court and shall be enforceable as such. Referral of disputes to the Industrial Court may be undertaken by either the Commissioner or a labour officer of a dispute mediated upon for determination. The Minister is empowered to do the same if it involves essential services, is likely to jeopardise the essentials of life and property and public safety, or involves members of management.[400] According to s 39 of the Trade Disputes Act, lawful industrial action is permitted only in the area of disputes of interest. Any party to a dispute of interest has the right to strike or lockout provided there has been an initial referral to the Commissioner of Labour, the dispute remains unresolved after 30 days (to be extended by another 30), there is a 48-hour notice period in the prescribed form to the Commissioner and affected parties, or it complies with any rules of conduct agreed to either in the Code or the mediator's guidelines. Under s 18(1), the jurisdiction of the Industrial Court excludes disputes of interest.

Objectively, the strict pre-conditions for lawful industrial action include, under s 40(3), the obligation on the employer not to hire scab workers where parties have agreed to the provision of minimum service. Where no such agreement exists, 14 days after the strike or lockout commences, this obligation shall lapse. Where a strike fully complies with said provisions, no striker shall be liable either in delict or for breach of contract. No dismissal for this purpose, other than other justifiable grounds, shall be lawful. To this extent, s 42 provides that no civil proceedings shall proceed in such circumstances except for any act in contemplation or furtherance of a strike that constitutes defamation or an offence.

[400] Section 60 of Cap 48:01 and s 14(3) of Cap 48:02.

6.6.3 Industrial action procedure

The trade dispute must first be reported to the Commissioner, who must proceed in compliance with the provisions of s 7 and in particular s 7(3). In the event of a failure to resolve by the Commissioner after 21 days, the union or workers may proceed with industrial action. Where a union in terms of Cap 48:01 is the exclusive negotiating body for the aggrieved employees, only its members may be entitled to vote in secret ballot if so directed by the Minister. Secret ballots must be supervised by labour officers as authorised in writing by the Commissioner. All centres so affected shall, on the same day and at the same time, hold such secret ballot nationally. Where there has been full compliance with the aforementioned conditions, any subsequent industrial action shall be lawful. Participants are therefore free from liability. Organisers, shop stewards are free from prosecution. In terms of s 47, an employer who locks out shall be free from any civil proceedings.

6.7 The role of the Industrial Court in Botswana

The Industrial Court system came into existence in 2004, though there had been decisions regarding labour disputes before its advent. It is established by the Trade Disputes Act (TDA) as a court of law and equity and mandated to settle trade disputes and secure and maintain good industrial relations in Botswana. All appeals against it shall be tabled before the Court of Appeal. It may permit certain matters to be addressed directly to the Court of Appeal in terms of a certificate of urgency through a motion of notice supported with an affidavit as to the facts for which relief is sought.

6.7.1 Powers and functions

The court is vested with exclusive jurisdiction in every matter properly before it, and its functions include:

(a) hearing and determining all trade disputes except disputes of interest
(b) interdicting unlawful strike actions;
(c) hearing appeals and reviews from mediators and arbitrators;
(d) directing the Commissioner to refer a dispute before the court to arbitration;
(e) directing the Commissioner to assign mediators where a matter requires proper mediation;

(f) referring any matter to any expert and receiving such determination as evidence;
(g) generally directing affairs, providing directions and determining any and all disputes where practicable; and
(h) ascertaining matters of law for ruling on and determining whether an issue is one of fact or of law.

The Industrial Court, created by the Trade Disputes Act, is vested with all the powers and rights set out in the Act as a court of law and equity. The court, or any division of the court, shall have exclusive jurisdiction in every matter properly before it under the Act. There shall be an appeal to the Court of Appeal against decisions of the Industrial Court as the latter court has concurrent jurisdiction with the High Court. Whether this is in fact so is another issue.

The officers of the court shall be appointed by the President from among persons qualified to be appointed as High Court judges in terms of s 96(3) of the Botswana Constitution. Normally, a judge shall sit with two nominated members selected by him or her, one from a group representing employers and the other from a group representing employees, as submitted to him or her.

6.7.2 The question of law and equity

Since the court may regulate its own procedure and is not bound by the rigidities of the formal courts, it may use any resources considered appropriate in the furtherance of its mandate.[401] The court is referred to as one of law and equity because it does not concern itself with only matters of common law and Roman-Dutch law notions of justice. Therefore, the Act gives the court a discretionary power to order reinstatements and award compensation within certain parameters in the event of unfair dismissals or termination of contracts. The court also deals with fairness, ethics and norms of international best practice. Discretion, fairness and ethics are not necessarily matters of positive law but an attempt to empower the court to take any steps within accepted practice and norms to enhance industrial relations. Therefore, with the end goal as good industrial relations instead of abstract juristic and doctrinaire justice, it is acceptable for the court to be referred to as a court of law and equity,

[401] Section 18 of the TDA 15 of 2004.

even if its operational framework is pre-determined.

6.7.3 The Industrial Court and worker formations

This role of the Industrial Court suggests that it also enjoys the power to determine who may or may not form and join worker formations. With regard to the recognition of unions at the workplace, the law stipulates that such recognition ought to be granted unless the representativeness has not reached the one-third threshold with reference to all employees, in terms of s 48 of the TUEOA, or the Industrial Court has authorised the withdrawal of such recognition for a stated period. The conditions warranting such an order are not specified but are assumed to form part of the broad range of jurisdictional prerogatives of the Industrial Court.

The International Covenant on Economic, Social and Cultural Rights requires that ratifying states must ensure the right of everyone to form trade unions of their choice and for unions to function freely.[402] Article 22 acknowledges the right to strike subject to compliance with domestic laws. Article 22 of the International Covenant on Civil and Political Rights also provides that employees of the state also have the freedom to form and join trade unions. Yet Convention 98, somewhat ambivalently, specifically defers to municipal discretionary authority with regard to the position of public servants engaged in the administration of the state, including those in essential services, while contending that this deferential position adopted is without prejudice to those affected.[403]

A more robust teleological role by the judiciary could have helped, for example, by diluting the restrictive impact of legislation compared to constitutionally guaranteed rights. In Britain, the passage of the Human Rights Act of 1999, which came into effect in 2000, gave statutory effect to the European Convention on Human Rights. It also provided that the most direct method of upholding the Convention rights is by allowing the courts to enforce them directly against public authorities, including the state.

In the European Union, one can see, from the *GCHQ* case among others, the stand of the ECHR on the position ceded to the state on how and, more importantly, how far to impose

[402] Art 22.
[403] Art 6 of Convention 98.

restrictions on segments of the society. In Botswana, the constitutionality of the exclusion of state employees from union membership has not been called into question until now. Rather, certain other sections have been challenged as unconstitutional. Perhaps the primary role of the Industrial Court in particular is to safeguard state interests in these matters.

In 2008, the Botswana Railways Crew Union approached the Industrial Court for the court to determine whether the Botswana Railways management had a right not to recognise the union, after it had been duly registered. In his ruling, the Judge President interpreted the relevant Act (TUEOA) as saying that, inferentially, the crew members were employees of the railways engaged in the same trade as other employees and could therefore demand recognition as a separate negotiating body. However, Botswana Railways countered that the Act stipulated a threshold of one-third of employees of an *enterprise*, not a specialised trade or vocation forming part of that enterprise.

In January 2010, the Botswana Railways Corporation challenged the Industrial Court decision before the Appeal Court, questioning the interpretation of the Act as proffered by the Industrial Court, particularly as the crew were already members of the Botswana Railway Workers Union, which recognised because it satisfied the requirement of 25 per cent of the total workforce. To understand the dilemma better, we need to refer to s 48 of the TUEOA and s 32 of the TDA. Section 48 of the TUEOA stipulates that to be recognised as a negotiating body, a trade union must represent 'at least one third of the employees of an employer'. Once this requirement is fulfilled, the union may apply to the Commissioner of Labour under s 32 of the TDA.

However, s 32 of the TDA incorrectly refers to s 50 of the TUEOA in respect of recognition at industry level for bargaining purposes. This is now located under s 48A. Under the two statutes, there is no mention of the physical or vocational peculiarities of a union. It follows then that if individual trades were to form unions and get registered, unless they associate with other formations, it is impracticable to attain a constant one-third of the workforce of most enterprises. The internal arrangements of employers' organisations comprise several layers and categories of employees. The problem begins with getting registered as a union of fitters, if there are only 10 fitters in a workforce of 1,000. This is why in countries such as South Africa, unions describe themselves as 'allied' or amalgamations.

It is respectfully submitted that the Industrial Court owes workers, employers and sister courts a definitive interpretation of the law: does one-third cover all employees or the separate categories of employees? By implication, the law intends to ensure the acquiescence and deferential acceptance and application of administrative rules disguised as law. In the case above, the exchanges between the bench and respondent counsel were mainly exploratory and hypothetical, suggesting that even the Appeal Court was struggling to get to grips with the fragmented statutes, because the Industrial Court had failed to initiate a proper codification of the labyrinth of the labour law regime obtaining in Botswana.

The role of the Industrial Court epitomises the role of the courts within the dynamics of the state–labour–judiciary relationship in Botswana. Secondly, it also provides an insight into the internal force that propels the courts in a given direction in their relations with other social actors.

6.7.4 The Industrial Court and industrial action

In 1969, in the course of the debate on the Trade Union Bill in the Botswana parliament, a 'strike' was defined as including other forms of a strike, such as 'go slow', 'no overtime', or 'withdrawal of goodwill'. Since then, the strike has come to be embodied in the definition by Lord Denning MR in *Tramp Shipping Corporation* v *Greenwich Marine Inc.* His Lordship defined a strike as–

> a concerted stoppage of work by men done with a view to improving their wages or conditions of employment or giving vent to a grievance or making a protest about something or other or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.[404]

Industrial action includes strikes, but not all disruptive activities are strikes as the Act sought to clarify in the expression 'concerted stoppage'. In the world of work, the etymology of industrial action is not coterminous with sabotage or mayhem. It should be seen as a right inherent in the ramifications of the contractual relationship. Strikes are not the equivalent of the managerial prerogative to unilaterally change work conditions, but they suffice as

[404] *Tramp Shipping Corporation v Greenwich Marine Inc*. [1975] 2 AER 989 CA

inducements or deterrents against abuse of employer prerogatives. In social ethics, a system which compels people not to withdraw their labour is totalitarian in intention.
Sometimes, strikes are called psychological vents for tension created by the relationships generated by the labour contract. They are in the nature of other social protests. As Davies observed, 'to think of industrial relations in terms of strikes or of labour law in terms of strikes is absurd'.[405] Legislating strikes into oblivion is possible with the proscription of all labour collectives, but this is antithetical to democracy and social cohesion.

> According to Khan-Freund and Hepple workers will go on strike, whatever the law may have to say about it. The common law of conspiracy was unable to suppress strikes just as French legislation failed against coalitions and Pitt's Combination Acts were unable to suppress trade unions in England. Freedom to strike is a legal, not a sociological concept, and, where strikes are forbidden, there is no such freedom, however frequently they may occur.[406]

6.7.5 Statutory definition of service as 'essential'

In South Africa, the Essential Services Committee (ESC) has, over the past fifteen years, after due notice and public investigation, designated a large number of services as essential services. Among these are: municipal health, municipal security, the supply and distribution of water, the security services of the Department of Water Affairs and Forestry, fire-fighting, services required for the functioning of the courts, and blood transfusion services provided by the South African Blood Transfusion Service.

The following services in the public sector are part of those determined to be essential services: emergency health services and the provision of emergency health facilities to the community or part thereof, all electrical services, all safety services, all security services, and the maintenance and operation of water borne sewerage systems, including pumping stations and the control of discharge of industrial effluent into the system and the maintenance and operation of sewerage purification works. What this suggests is a transparent, ongoing

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[405] Davies op cit 291.
[406] Kahn-Freund & Hepple *Laws against Strikes (1972)* (http://trove.nla.gov.au/version/15412837. 60p 25/9/2015

process openly discussed and not arbitrarily and strategically imposed measures intended to coral and harness labour formations.

Unions required to give strike notices in essential industries where the proposed strike will affect the public interest will have to act with considerable prudence in deciding not to give such notices. The unions may have great difficulties in assessing in advance whether the proposed strike will affect the public interest with the consequence that, if notice was not given, the strike will be regarded as unlawful. If workers are unable, collectively refuse to work as a last resort, they cannot bargain collectively and effectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack potency and credibility.

It is to this end that Holmes postulated that-

> Combination on the one side is potent and powerful. Combination on the other is the necessary and desirable counterpart if the battle is to be carried on in a fair and equal way. They have the same liberty that combined capital has to support their interests.[407]

The rationale behind collective bargaining is to maintain industrial peace. However, there must be a peace to maintain. To have the peace, the workers must have a corresponding power manifested in the collective right to strike. In essence, without this collective power, workers will be at the mercy of the employer.

The Labour Relations Act (LRA) of South Africa recognises this constitutional right to strike but subjects the right to a number of limitations. Among those limitations is a limitation which provides that no person may take part in a strike if that person is engaged in an essential service. Because the right to strike is so important, a limitation of this kind needs to be justified. To be justified it needs, among other things, to be limited. The essential services limitation on the right to strike in the LRA has not been subject to constitutional challenge and it is unlikely that it will be, because it is clearly justified and properly circumscribed in its scope.

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[407] *Vegelahn v Guntner* [1896] 167 Mass. 92,44 NE 1077 108 per Oliver Wendell Holmes.

In Botswana rights enshrined in the Bill of Rights may be limited in terms of laws of general application. This is to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[408] There is thus a need to balance the right to strike with other fundamental rights, such as those to health, safety, food, water and social security, which are also enshrined in the Bill of Rights. From this point of view, in order to achieve an appropriate balance, workers in essential services should not be totally denied their basic freedoms of association, organization and movement in open democracies. The position is based on the earlier discussion of ILO provisions but from a different perspective.

In this regard, the interpretation is that, though this exclusion has been tacitly sanctioned by the ILO, it is only to a limited extent. The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation (CEACR) recommends that the right to strike should be restricted only in relation to public servants exercising authority in the name of the state and in relation to genuinely essential services, namely, 'those the interruption of which would endanger the life, personal safety or health of the whole or part of the population[409]'.

As said earlier, there is the element of arbitration in determining whether a service contemplating a strike is essential. Some countries have codified this common law of interest arbitration into a statute. An important subsidiary principle which applies in such arbitration is that public sector employees should not be expected to subsidise public services. They are not second-class working citizens. If the reasonable wages they should receive are such that they render the public authority unable to continue to provide the service, then that is a political problem, not one that should be reflected in an arbitral award.

Consequences of an unprotected strike include those consequences that have a potentially punitive impact on the participants in any conduct in contemplation or in furtherance of such a strike. Such persons do not fall within the protection provided by the TDA of Botswana. It provides that persons who take part in a protected strike or in any conduct in contemplation or in furtherance of a protected strike do not commit a delict or a breach of contract by doing

[408] Constitution of Botswana Chapter 11 Chapter II
[409] ILO,198b, par 214

so. The result is that any person who suffers harm as a consequence of an unprotected strike may claim damages from a union and/or workers who participated in or furthered the strike. This may be done in terms of the common law or in terms of the relevant legislation.

In such instances, in appropriate contexts and in accordance with its jurisdiction, the law gives the Industrial Court or the High Court the power to order the payment of just and equitable compensation for any loss attributable to the strike. Actions of this kind are uncommon because, once the dust has settled after a strike, employers are reluctant to 'rock the boat' with court actions, and the average person on the street is reluctant to take on a union in court because of the costs and delays involved. Failure to comply with such an interdict or order is a factor which the industrial Court may take into account when ordering just and equitable compensation. The court grants such interdicts and trade unions are not expected to flout these interdicts contemptuously. The fact that union organisers have seldom been summoned before court to explain their contempt does not imply that such powers of the court are non-existent.

6.7.6 Statutory definition of essential services

In South Africa, s 213 of the LRA widely and clearly defines essential services as follows: '(a) A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Service.'

This definition is openly acknowledged as being in line with ILO recommendations and not just a reference to nebulous principles in the name of a domestic legal system or legal theory. If that was all that the Labour Relations Act (LRA) did to define essential services there would be much uncertainty about which workers fall within the definition and which do not. In order to limit such uncertainty, the LRA provides for the establishment of an Essential Services Committee (ESC) which must determine which services fall within the definition. The LRA provides that the Minister of Labour, after consulting the National Economic Development and Labour Advisory Council (NEDLAC), and in consultation with the Minister for the Public Service and Administration, must establish an ESC under the auspices

of the Commission for Conciliation, Mediation and Arbitration (CCMA). Members of the ESC are required to have knowledge and experience of labour law and labour relations.[410]
The functions of the ESC are to conduct investigations as to whether or not the whole or a part of any service is an essential service and then to decide whether or not to designate the whole or a part of that service as an essential service. The ESC is also required to determine disputes as to whether or not the whole or a part of any service is an essential service. In addition, at the request of a bargaining council, the ESC must conduct an investigation as to whether or not the whole or a part of any service is an essential service.

The LRA also prescribes the process which the ESC must follow in designating a service as an essential service. In essence the ESC must give notice of an investigation and invite interested parties to submit written representations and to indicate whether they require an opportunity to make oral representations. Interested parties are then given a right to make oral representations in public. The ESC is then charged, after having considered any written or oral representations, to decide whether or not to designate the whole or a part of the service that was subject to an investigation, as an essential service.

If the ESC designates the whole or a part of the service as an essential service, then the ESC must publish a notice to that effect in the Government Gazette. Importantly, the Parliamentary Service and the South African Police Service are deemed to have been designated essential services. The effect of this is that no investigation and determination by the ESC is required in respect of those services. However, the disciplined services sus as the South African Police Service was held to be confined to the service performed by members of the South African Police Service, the South African Defence Force and others, excluding other employees employed in such services. While they may form and join unions dealing with its members' welfare they cannot go on strike.[411]

To date, there is no provision for an essential services committee in the Botswana legislation and this critical lack has been responsible for many misconceptions. This state of affairs has resulted in the state unilaterally arrogating to itself the right to determine labour matters. The determination of labour matters should be a collective, deliberative and democratic process.

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[410] Labour Relations Act (LRA) s 115 –Functions of the CCMA
[411] *SA National Defence Force Union v Minister of Defence and Another*. (1999) 20 ILJ 2265

6.7.7 Industrial action and essential services in Botswana

The new definition of 'trade dispute' includes a dispute between unions, a grievance, and any dispute over the application or the interpretation of any law relating to employment; the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work; the entitlement of any person or group of persons to any benefit under an existing collective agreement; and the existence or non-existence of any collective agreement.

Other disputes are the dismissal, employment, suspension from employment, retrenchment, re-employment or reinstatement of any person or group of persons; and the recognition or non-recognition of an organisation seeking to represent employees in the determination of their terms and conditions of employment. With regard to essential services, the relevant schedule had, prior to the recent questionable amendment, identified the following specific areas as essential services, unlike the approach adopted by the ESC in South Africa under the LRA. These are Air Traffic Control, Botswana Vaccine Laboratory, Electricity, Fire, Water Services, Transport and Telecommunication Services, as deemed necessary, Operational Services of the Railways, Health Services and Bank of Botswana.[412]

Relative to the ILO understanding of core essential services, some of those in the schedule immediately become superfluous. In furtherance of the minister's discretionary powers, he may invoke s 49 of the Act to amend the schedule, by order published in the Gazette. The minister may also make statutory regulations with regard to any matters required to be prescribed under the Act. The key question is whether the minister has the authority to amend a core element of a statute without parliamentary approval, bearing in mind that statutory discretionary authority exists only in relation to subordinate or delegated legislation.

Secondly, assuming the amendment as gazetted was effected as a statutory instrument then it ought to have been subjected to parliamentary scrutiny and approval. In effect, the validity of widening the basket of essential services without proper justification and in contempt of both domestic law and the ILO's remonstrations creates room for concern. That singular act of defying the legislature, international norms and practices and proceeding on grounds of

[412] S 49, [Cap 48:02] and Schedule of Essential Services

domestic monist prerogative suggest a state in siege and a government bent on emasculating the nascent labour front. Regarding legal strikes, the regulatory interventions do not and cannot determine the lawfulness or otherwise of strikes with regard to essential services, given that the procedures are deliberately cumbersome. It is therefore ironic that these fragmented unions are credited with better resourcefulness than the state and its agents in the theatre of labour relations. The role of the Industrial Court in particular is expected to be crucial in matters related to the issue of employees, worker formations and essential services. In view of this, more will be said about the court later.

6.8 Interpreting the reality

This section is germane to the position of the paper mainly as an illustration of the dynamics of the state–labour relationship in Botswana. Its other role is to provide insight into the pivotal concern with the exploration of the internal motive force that propels the state in its relations with other social actors such as labour. It discusses some major cases that have a bearing on the subject matter of essential services.

The first of these cases was between the Botswana Land Boards and Local Authorities Workers Union, the Botswana Public Employees Union, the National Amalgamated Local and Central Government and Parastatal Workers Union, versus the Director of Public Service Management and the Attorney General.

This case concerned the interdiction of public sector unions by the Industrial Court at the suit of the Attorney General. The interdict sought by the Attorney General to bar the unions from further involvement in a strike. The ground for the appeal was that the workers were from essential services and the strike was therefore unlawful. The union members were therefore liable to sanctions including dismissal. The unions noted an appeal to the Court of Appeal. Prior to the hearing of the appeal, the Director applied to the Industrial Court for leave to execute the court's judgement which held that the strike was unlawful.[413]

[413] *Director of Public Service Management and Another v Botswana Land Boards and Public Authorities Workers Union and Others In Re: Botswana Land Boards and Local Authorities Workers Union and Others v Director of Public Service Management* 2012 BLR 93 (IC).

The concerned unions raised a point *in limine* that, according to the common law, the noting of an appeal automatically suspended the execution of the judgement. While noting the argument, the court nevertheless stated that it has a wide discretion to grant or refuse such leave. Subsequently, the leave was granted. This was followed by the collective dismissal of the members of the above-mentioned unions. The third case became known as the 'mother of all strikes' in Botswana.[414]

It is important to briefly recall the circumstances of the cases. On 18 April 2011 the members of the aforementioned unions embarked on nationwide industrial action that also involved some essential services employees as well as employees from non-essential services such as veterinary services, education, transport and other services. The Industrial Court, at the behest of the state, subsequently issued an interim interdict restraining participation in the strike by the essential services workers. This order was ignored and, because it was subsequently executable, the state dismissed those essential service workers who had refused to return to work.

In June 2011, the Botswana Federation of Trade Unions (BFTU) was informed by the office of the Commissioner of Labour of an impending meeting by the Labour Advisory Board, the purpose of which was to amend the schedule listing essential services so as to include veterinary and teaching services. According to the court records, the Commissioner made reference to the ILO definition and categorisation of 'essential services' which, from the foregoing parts of this study, was a misinterpretation of the ILO position. First, animal husbandry is not cited as an essential service and, in any case, given the poor performance of the Botswana Meat Commission and the cattle industry in terms of Gross Domestic Product as a whole, cattle could not be regarded as the 'backbone of the economy'.[415]

Another contention was that is an essential service. The rational was that, without teaching, there 'would be no education'.[416] It is common knowledge that intramural teaching is not the only form of education. Further, strikes by teachers targeted at short-term goal such as salary increase often peter out once the goal has been obtained, no matter how little. As a

[414] *Botswana Public Employees Union (BOPEU), Botswana Teachers Union (BOTU), National Amalgamated, Local & Central Government and Parastatal Workers Union (NALCGPWU), Botswana Secondary Teachers Union (BOSETU) v Minister of Labour and Home Affairs, Attorney General and the Director of Public Service Management (DPSM*) MAHLB-000674 (2012).
[415] Para 14, page 4.
[416] Ibid.

consequence thereof, Statutory Instrument no. 49 was gazetted on 17 June 2011, changing the scope of the schedule of essential services. It also added ancillary services like telecommunications, transport, veterinary services, teaching services, diamond-sorting, cutting and selling services as core essential services and all support services in connection therewith.

The Legislature then amended nullified the Schedule to annul SI 49 and directed the Minister to gazette the annulment. Rather than doing so, the Minister ignored the order and proceeded to gazette the same changes using a new Statutory Instrument (No.57). In the face of this, the Appeal Court endorsed the irregular and unlawful amendment in the following case and virtually usurped the power vested in the Legislature. Further, the Court of Appeal subsequently declared the following to be essential services-

> doctors, nurses, other specialists, support staff, caterers, grounds men, cooks and night watchmen,[417] even when there was no provable looming disaster or 'acute national disaster' as explained by the ILO.[418] This also refers to 'acute national emergency or genuine crisis situations such as those arising from serious conflict, insurrection or natural disaster'.[419]

The union then decided to challenge these developments on several grounds, in particular the validity of Statutory Instrument 57. The study has only selected a few pertinent grounds and these are examined below:

(a) The minister's powers under s 49 of the TDA were *ultra vires* s 86 of the Botswana Constitution. This is because the use of such discretionary authority conveys the impression that the legislature, contrary to the Constitution, purported to relinquish its legislative authority and oversight and, by so doing, conferred unconstitutional power on the executive to amend an Act of Parliament.

(b) By placing a limitation on the right to strike, which must be seen to be reasonably justifiable in a democratic country, the minister's amendment of s 49 is *ultra vires* s 13 of the Constitution.

(c) The amendment is *ultra vires* s 49 of the TDA which, on a proper reading, does not empower the minister to unilaterally publish an order whose effect is incompatible with

[417] Civil Appeal No. CACGB-053-12 (see especially Para 40 pages 97-98)
[418] ILO 1996 para 527.
[419] Ibid para 152.

Botswana's international law obligations as a recognised member state of the ILO that has ratified the Conventions relevant to this case.

(d) Botswana's membership of the ILO and ratification of its Conventions gives rise to a legitimate expectation by workers that the minister will not include services outside the ILO standards, and any such act shall be susceptible to review.

Before making his order, the judge referred to a recent report by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR, 2011) about events in Botswana. Of note is the following observation: 'The Committee considers that the new categories added to the Schedule do not constitute essential services in the strict sense of the term and therefore request the Government to amend the Schedule accordingly.'[420]

In his decision, the learned judge held as follows;

(a) Section 49 of the Trade Disputes Act 15 of 2004 is incompatible with the Constitution of Botswana and is accordingly invalid.

(b) The Trade Disputes (Amendment of Schedules) Order contained in Statutory Instrument 57 of 2011 is invalid and of no force or effect.

This study contends that, on the face of it, the issues raised in this 98-page judgement need no further interpretation because it indicated and conveyed a clear message as to developments in the future and suggested that there would be more interesting developments. Indeed, the developments came in the form of the second case decided by the Appeal Court on 20 March 2013, where the decisions of the court *a quo* were overturned. This case was an appeal against the decision of the High Court that declared the interdiction and subsequent dismissals above as unfair, unlawful and invalid. The case is examined below.

Attorney General

versus

Botswana Land Boards & Local Authorities, Workers Union, Botswana Public Employees Union, National Amalgamated Local & Central Government &Parastatal Worker's Union and Kefilwe Toteng

[420] 'The BOPEU Case' page 7 para 225.

It should be remembered that this trio of cases is related to the same issues discussed above in which 2,934 workers were dismissed for failing to comply with an Industrial Court interdict against a planned strike that took place in 2011. As indicated above, the High Court set aside the order of the Industrial Court and declared the dismissals to be unlawful and invalid. The Attorney General then appealed.

Briefly, the Court of Appeal upheld the appeal, set aside the order of the High Court, and the costs were to be paid by the respondents jointly and severally. Given that the decision was supported by the full bench, it becomes necessary to examine how the bench arrived at such a sweeping conclusion, with serious implications for constitutional and administrative law, together with the perceptions conveyed to the workers at large.

Regarding 'essential service' the court concluded that all employees in the health services were included. There has been no such provision in both the Public Service Act and the Trade Disputes Act. Irrespective of that, the Appeal Court pronounced as follows-

> In our view, all the employees in an essential service play an important role individually towards ensuring the effectiveness of the team delivering the essential service in question. Along with doctors, nurses and other specialists, the support staff, caterers, grounds men, cooks, and others ensure a hygienic, safe and healthy environment conducive to the effective delivery of the service and in the health and swift recovery of patients.[421]

The Judge President went further to declare that essential services include not only those mentioned in the original schedule of the statute and the subsequently amended list by the Minister, but also –

> but any other [undertaking] whose interruption might endanger the life, personal safety or health of the population or part thereof.[422]

He did not attempt to address the impracticality of such a subjective definition and the imprecise explanation of acts that endanger life in his quest to justify the harnessing of workers for easy control. The court did not deem it necessary to examine the ILO range of

[421] See par 97.
[422] Ibid.

services that may be essential and the method of arriving at this.[423] The court, however, after asserting the adequacy of domestic legislation to deal with labour matters, sought support from the same ILO document where the ILO expresses its reluctance to interfere in spheres of domestic legislation.[424]

Finally, the Judge President concluded that

> it would be totally unacceptable for the withdrawal of essential services including public medical services, to be used as a weapon in a general strike.'

In contradistinction to this opinion, it is apt to recall that the

> freedom to strike is a legal, not a sociological concept and where strikes are forbidden, there is no such freedom however frequently they may occur.'[425]

Attention is also drawn to the fact that, as far back as 1942, it was observed that

> [t]he right of workmen to strike must be seen as an essential element in the principle of collective bargaining.[426]

It is worth noting that, while the court dismissed the analogy of a boxing match, it had much earlier been suggested that every strike is in the nature of war, where gain on one side implies loss on the other. Further, it is submitted that the Court of Appeal erred in not undertaking a survey of the voluminous literature on industrial action whether by essential services workers or not. At any rate, current labour legislation in Botswana does not prohibit strikes *per se.*[427]A brief survey of Parts VI to VIII of the Trade Disputes Act would have alerted the court to the realities and saved them the need to pontificate. There is thus a need to re-examine the relevant statutes and formulate workable procedures because strikes are inherent in employment relations irrespective of what the Appeal Court might say.[428] In retrospect, the

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[423] Committee of Experts on the Application of Conventions and Recommendations (CEACR) Observation Report (Botswana) ILO Session Adoption 2011.
[424] Freedom of Association Digest of Decisions and Recommendations, Committee of the Governing Body, ILO 5th revised edition (2006).
[425] Khan-Freund & Hepple op cit. http://trove.nla.gov.au/version/15412837
[426] Per Lord Wright in *Crofter Harris Tweed Co. Ltd v Veitch* 1 AER 142, 1942.
[427] See s 39(1) of Part VI of the Trade Disputes Act [Cap 48:02] where it is stated that every party to a dispute of interest has the right to strike. Furthermore, s 45 provides for a minimum service to be in place prior to any contemplated industrial action. The procedure for lawful industrial action in essential services is laid out in Part VIII of the Act. However, all the procedures are expected to culminate in s 45(4) which does not as yet exist.
[428] Part XI of the Public Service Act provides the same freedom to associate and undertake industrial action (except for those in 'management') once laid-down procedures are followed.

tone and nuances of the Judge President conveys a veiled tussle between the Young Turks of the High Court and the executive-minded Old Guards of the Court of Appeal

6.8.1 Trade disputes and essential services in Botswana

The Trade Disputes Act provides very elaborate procedures for the settlement of trade disputes generally, and the settlement of trade disputes in essential services. It distinguishes between disputes of right and disputes of interest for the purposes of what can trigger a strike and which disputes must ultimately be resolved by the Industrial Court. The labour laws of Botswana do not prohibit industrial action in any form once it is lawful, constitutional and official. Every party to a dispute of interest has the right to strike or lockout. However, there are extensive and stringent conditions, as well as the quasi-judicial powers of the Commissioner of Labour and the specific powers of the mediators and arbitrators. In addition there is the political–administrative oversight of the responsible minister.

The procedure for legal strikes in these areas alone is daunting. The Commissioner must be informed of any contemplated action in terms of s 5(2), (3) and (4). Should the minister not acknowledge or initiate action within 21 days, then three days before such action, he or she must be notified of a secret balloting process to be supervised by labour officers, and occurring simultaneously at all branches in the country. There must be a two-thirds majority decision to strike. Assuming all these conditions are complied with, the employer and employees must agree on a nominated skeleton staff to man these services during the course of the strike (ss 43 and 44).

If indeed strikes are legally permissible, these procedures, covering these sensitive areas, can be only be seen as restrictive regulations intended to make strikes legally impractical. Section 41 defines the nature of the punishable offence regarding essential services. It provides that any action or inaction whose known or probable consequence would be to deprive the public or any section of the public, either wholly or to a substantial extent, of an essential service or to endanger human life or public health is unlawful. Section 41 also covers serious bodily injury to any person or the exposure of valuable property to risk. The schedule that provides the list of essential services effectively covers all the strategic organisations and monopoly state corporations. Such organisations would need to appoint a minimum number of officers to man these services during a strike.

The two-thirds majority secret balloting must be organised under the supervision of labour officers at all branches simultaneously (there are only a handful of these officers in the whole country). Should the Commissioner of Labour react, even by way of an acknowledgement, the strike is thrown into abeyance sine die. In addition, transport and maintenance services in relation to these are also affected. Much of these are public sector monopolies in the form of departments and corporations fully or partially controlled by the central government. These are directly or remotely related to the operations of the key areas of the Botswana economy and are therefore supposedly strategic.

State-driven industrial relations can be seen as a process of structuring the labour force in general into a stable atmosphere, and this derives from the logic of capitalist development. In sanctioning compulsory dispute resolution, the state assumes a defensive posture on behalf of the public in labour relations. By curtailing strikes and other forms of disruptive manifestations of dispute, it contains conflict and maintains civil peace. More importantly, by legislation, the state steers labour relations in a preferred direction, using the law as an agent of regulating the parameters of workplace relations.

The relationship between the state, labour relations and labour disputes is that disputes are partially caused by the attitude and socio-economic policies of an active state. This state then seeks to mediate using industrial relations structures which it creates or seeks to influence, regulate and control. As long as the workplace is representative of the wider society, labour disputes and the prevailing labour relations system will dictate a form of legal intervention, because the state sees the workplace as unstable. The state therefore sees a need for regulating workplace relations. There is no inherent evil in resolving labour disputes. The problem appears to be the methods put in place. As a result, the formalisation of structures and of procedures place labour dispute resolution in the domain of public bureaucratic oversight.

6.9 The Industrial Court in perspective

It must be remembered that the court was created under an Act of Parliament with ministerial supervision. Its judges hold the same rank as High Court judges. Secondly, arbitral awards from the ad hoc ancillary mediation structures carry the same force as High Court decisions

but are subject to the Industrial Court's oversight. The Industrial Court is empowered to make, subject to ministerial consultation, arbitral rules outside the parameters of the Arbitration Act. To all intents and purposes, the Industrial Court is a manifestation of a close affinity between the state, law and the bureaucratic elite, rather than the conventional judiciary.

The Industrial Court does not come across as a standard bearer for separation of powers as a juristic concept in an environment imbued with a fusion of these very powers. Taking cognisance of this, it should therefore indicate whether, rather than being subject to the appellate jurisdiction of the High Court, it prefers to have its own Industrial Appeal Court. This would ultimately constitute a parallel structure to the normal judiciary. The justification for this is that, in practice, the alternative dispute resolution structures fall under the Commissioner of Labour. Their decisions then proceed to the Industrial Court from where reviews, endorsements and other supervisory deliberations and decisions could go to a higher court of similar specialised focus, training and competence.

Labour legislation in Botswana is still evolving. Changes are bound to take place. First, when the colonialist decided to import laws of little or no relevance into Bechuanaland, it was for political and economic reasons. Secondly, the laws evolved and transmuted into series of Acts in constant transition symbolising the transfer of state power to trusted acolytes within a dependency relationship where continuity apparently became preferable to a thorough dismemberment in order to select what fitted the situation. In Botswana, labour law and its attendant disputes will continue until such time as the parties appreciate parity and plant the seeds of collaborative and reflective engagement in their search for ways to reduce and manage labour-related disputes.

It is clear that, since its inception, the Industrial Court in Botswana has acted more as an extension of the state bureaucratic machinery by supporting state labour regulatory measures. Although it is a higher court, it has been more of an appendage to the senior courts of the judiciary. Similarly, the Appeal Court has done its best to defend state intervention by resorting to the parochial interpretation of labour legislation. To date, the decisions affecting how the laws are interpreted and applied on the ground have not been addressed, resulting in the state having its way in how it interprets and applies labour relations law in Botswana. It is not that the Appeal Court is unaware of existing precedent, to which it has easy access.

In the celebrated case of *Vegelahn* v *Guntner*,[429] Holmes said the following about labour combinations and those of employers and their rights: 'Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counter-part if the battle is to be carried out in a fair and equal way. They have the same liberty that combined capital has to support their interests.' Sometime later, in 1942, Lord Wright, in the case of *Crofter Harris Tweed Co Ltd* v *Veitch*[430] declared, and rightfully so, that 'it is far more important that the substance of many of the norms of collective bargaining should defy the use of legal sanctions. As such, the right of workmen to strike must be seen as an essential element in the principle of collective bargaining.'

This study contends that that it is more useful to find the causes of strikes and eliminate them than to sharpen the tools of control and regulation. The purpose of the law must be to maintain an equilibrium of power. The role of law must be to regulate the normal exercise of power. The power of the 'lockout', whether it is in furtherance of the right to security of property or not, must be countered by the power of the collective refusal to work. Obviously, there can be no equilibrium in industrial relations without the right to strike. The law must take cognisance of this fact and must protect the aspirations of workers in relation to the might of the employer.

This could be achieved by recognising the right of employees to legitimately utilise their collective sanction. Workers do not resort to strikes because they are 'ill-informed' or 'ill-advised'. It is also not true that 'strikes may be the last resort for the workers', or that 'government [must] be more concerned about the harm that strikes can cause to the economy of the nation', particularly a nation 'which relies mainly on foreign investment'.[431] But, it is a fact that, when social conditions deteriorate, when avenues for democratic participation in resource allocation and not in their production are non-existent, then a strike becomes like a 'cancer, and cancer when it is not cured at an early stage kills the whole body.'[432]

It is submitted that the cure for such a 'cancer' is not legislation per se but legislation that is holistic in its intention and effect. Strikes, like litigation, are a waste of social resources. As

[429] *Vegelahn v Guntner* (1896) 167 Massachusetts 92, 44 NE 1077 at 108.
[430] [1942] 1 AER 142 at 157.
[431] Hon Nwako Minister of State, HANSARD 6-9/8/68 BNB 1523 at 147 (National Archives, Gaborone).
[432] Hon H. P. Matante (Francistown/Tati Opposition Leader) HANSARD ibid.

social services grow in response to demand, the definitive turf of the 'essential' continues to change contours. This in itself imposes enough restrictions on the strike without any aggressive reactions to the agitations of an emasculated labour force.

This study fully concurs with the following observation that epitomises the inherently dichotomous nature of industrial relations:

> It is difficult to see how, in a case of a conflict of interests, it is possible to separate the objects of benefitting yourself and injuring your antagonist. Every strike is in the nature of an act of war. Gain on one side implies loss on the other, and to say that it is lawful to combine to protect your interests, but unlawful to combine to injure your antagonist, is taking away with one hand a right given with the other.[433]

The authorisation to declare strikes unlawful and to proceed to interdict them presumes a strict compliance with the confusing maze of procedural requirements indicative of a deliberate, regulatory and control regime of laws to subvert the legal strike.

It would appear then that the objective is not to facilitate a free democratic environment in which free protest can breed so as to be manageable, but to create a judicial posturing that precipitates confrontation and invites the deployment of the state's coercive authority. This study appreciates the wide differences between issues of the workplace as an entity and between individuals to a contract. That being the case, the problem this study faces is that there seems to be a conscious, albeit misplaced, focus on elevating industrial action into a unique phenomenon so as to demonise it. This elevation relegates the theatre of work and the socialisation processes thereof to an amorphous entity with the potential for socio-political intrigue and conspiracy.

The role of the Industrial Court in this regard appears to be that of an administrative tribunal. Its interdiction powers deal with any act or contemplated act wherein the union is enjoined to notify the employer and furnish the Commissioner. Any default creates a cause for an interdiction order. The question is whether this apparently automated processing adds value to labour dispute resolution. The Industrial Court should always emphasise the need for

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[433] Fitzjames *History of the Criminal Law of England* Vol. III volhttp://www.barnesandnoble.com/noresults/9780930342777 III

evidence to support any attempts to unravel the confusing and circuitous design of the law. Furthermore there is no hard evidence so far from the Industrial Court to suggest efforts attempts at reducing the legal regime to more accessible and easily understandable procedures.

As discussed above, the events leading to the BOPEU[434] confrontation with the Industrial Court was in sharp contrast to the decisions of the High Court. There is a festering climate of distrust and lack of legitimacy. This was demonstrated when the striking workers chose to ignore the interdict issued by the Industrial Court. For now, it is feared that the Industrial Court could become a victim of structural dependency and by so doing transform itself into an agent of the politico-legal trajectory of the state at a time when its neutrality and legitimacy are most required.

Section 24 of the TDA provides a range of remedial steps available to the Industrial Court in the event of wrongful termination of the employment contract or wrongful disciplinary action. Within this framework, statutory remedies such as reinstatement and compensation are provided, together with the conditions under which these may be awarded. The discretionary element is also statutory as the Act provides guidelines regarding range and choices. Thus, the Industrial Court does not enjoy absolute, unfettered discretion in these matters. For example, a statutory ceiling of six months' monetary compensation is imposed in any applicable circumstance.

Section 24(1) stipulates that compulsory reinstatement should be considered only where the termination was found to be unlawful in terms of s 23 of the Employment Act dealing with automatically unfair dismissals, read with s 24(2) of the TDA. In such an event, the court may order compulsory reinstatement with or without compensation. Prior to that though, the court is free to take into account the integrity of the enterprise and the effects on labour relations, the employability of the employee outside the enterprise, an irretrievable breakdown in trust, and an equitable balance between the employer's and employee's interests, among other matters.[435] Compensation may be ordered with or without reinstatement. Section 24(3) of the TDA provides that, with reinstatement, compensation must not exceed the employee's actual pecuniary loss as a result of the wrongful dismissal.

[434] MAHLB 000674-11/8/2012, unreported.
[435] *Onalenna & Maffa v L.B.B. Steam Contractors* (Pty Ltd) IC 8/98

Section 24(4) provides the conditions for the award as above. Section 24(5) and (6) provides for compensation of the employer as a result of the employee's wrongful termination. Here, the court is allowed to determine the amount of compensation, but within a range not exceeding six months' monetary wages.

The Industrial Court, while enjoying its discretionary authority, is nevertheless expected to provide reasons for its choice of determining factors originating from a basket of statutory, court-derived and National Industrial Relations Code of Practice guidelines in respect of any remedies awarded.[436] From the foregoing, the Industrial Court would appear not to have been playing a pivotal role in mediating industrial relations friction. This is only in the problematic areas chosen, where the interests of the state appear to clash with those of labour and even employer formations. Overall, in the arena of wage delays and underpayment, it has performed well. This applies also to complaints, harsh treatment, both substantively and procedurally unfair discipline, and occupational injury.

It is submitted that the Industrial Court as a specialised court, a court of law and equity, if not hidebound by covert ideological pursuits or any rules of court, can assert its authority in an area that is coterminous to politics and public administration. Modern labour law accepts that modern governance is undertaken in areas that form the subject matter of industrial debate and consequent industrial action. Reflectively, the court should adopt a stance that seeks to educate the parties, build bridges and deepen collaborative industrial relations. To do this, its decisions must not simply amount to a juristic rendition of problematic legislation and an affirmation of state infallibility. Rather, it should show the way out of the legal maze that is labour law in Botswana. It should make bold pronouncements on key issues and demonstrate teleological leadership.

In Botswana, practical labour law, labour relations defined in terms of disputes and suspicion. The resultant disputes indicate a fractious association. This state of affairs will persist until such time as the parties come to respect each other and create a platform for social discourse.

6.10 Conclusion

[436] *Botswana Building Society v Samuel Bolokwe* IC 15/99.

It is clear that, since its inception, the Industrial Court in Botswana has acted more as an extension of the state bureaucratic machinery in its supportive role of state labour regulatory measures. Although it is a higher court of the judiciary, it has been more of an appendage to the senior courts of the judiciary. Similarly, the Appeal Court has done its best to defend state intervention and the parochial interpretation of labour legislation. To date, the decisions affecting how the laws are interpreted and applied on the ground have not been addressed, resulting in the state deciding on how it interprets and applies labour relations in Botswana.

There have been ongoing efforts to harmonise the various statutes that have segregated particularly public sector employment law into petty fiefdoms overseen by bureaucrats. This amalgamation of regulatory mechanisms governing the public service is crucial in order to give practical effect to ILO-engineered reforms. However, this is also an indication of the problems caused by the provisions in the Constitution allowing derogation.

The conclusion to be drawn therefore is that the legislature reserves the right to exclude some segments of workers as it might deem fit. This is with regard to the notion of a complete freedom to strike on the one hand and, on the other, a prescription of the modalities for industrial action in respect of some employees and their categorisation. This also risks unjustifiably stifling the rights envisaged by s 13 of the Constitution of Botswana.

In its overall effect, labour legislation and policy formulation in Botswana as an evolving process is still essentially elitist and prescriptive rather than co-regulatory. One hopes the cases above will set the trend in asserting the intervention and guidance of the judiciary. Secondly, the requirements for lawful strikes by essential services are crafted so that a lawful strike is not possible. There is no sub-s (4) as referred to in s 45, which is necessary to legalise the procedures required for contemplated strikes. The said reference needs to be either completed or deleted and, ideally, a harmonised procedure adopted for both essential and non-essential services.

The industrial relations scene in Botswana can best be summarised as prescribed and regulated stability. Tripartite structures are essentially symbolic, as any union official who attends such meetings would confirm. Institutional mechanisms are largely advisory as they are mainly given statutorily prescribed roles. Their membership reflects the state's leadership position and the subjective and selective empowerment of the social partners, particularly

organised labour. Just as in the colonial past, the centrality, dominance and arrogated leadership by the state in all spheres, including labour matters, are still very evident. This position becomes the key cause of labour disputes. Contrary to expectation, it would appear that s 23 of the Employment Act [Cap 47:01] regarding automatically unfair dismissals is being flouted to victimise employees for their union activities.

On another level, it is apparent that there is a continuous wage disparity, even in the public sector.[437] This is in terms of the annual schedule of minimum wage rates in the face of increasingly high cost of living.[438] This is occurring in tandem with evident, differentiated and structured conspicuous consumption and accumulation by some segments of society. This could create socio-economic cleavages that might manifest themselves on the shop floor. It may also produce a simmering sense of injustice followed by periodic displays of dissatisfaction by workers. Left unresolved, these can crystallise into protracted conflict with unpredictable outcomes.

Another worrying development is that, since the recent amendments to the labour laws, worker formations have increased in number but have also become more fragmented. This is remarkable because, hitherto, the registrar of unions had been vigilant in exercising his vested discretion not to register or de-register unions. Initially, this was supposed to prevent this very situation of potential duplication, waste of resources and dissipation of worker collective capacity. Evidently, this is now prevalent.

Botswana may indeed be an economic success story but the labour front testifies otherwise. For the success to permeate all layers of the stratified society, there must be seen to be an inclusiveness. This is particularly so with regard to the processes for labour legislation and policy formulation. This is also because the regenerative labour force has, throughout the historical evolution of Botswana, played a constructive role in wealth creation. Yet, 40-odd years after independence, domestic workers and employees in agricultural undertakings have only recently been brought under the protective ambit of minimum wage policy and law.

By way of recommendation, it is time for an omnibus definition of a public servant or an employee in the public service. An employee is a worker whether he or she is described as a

[437] See *Sunday Standard* of 28June to 4 July 2015 at 23.
[438] Ibid.

temporary, permanent, manual, industrial or management worker. Basically, an essential service worker should also be seen as an employee who possesses the power to exercise authority in the name of the state. In this way, the labour laws should cater for all. With regard to essential services, there should be no presumption that each worker can be a threat to public health, security or welfare. This is why an essential services committee should be created. A minister should not be given this responsibility as he or she is, after all, a political appointee whose kind of work has no bearing on the realities of the workplace.

Such a committee should exercise the power to designate essential services, as is done in South Africa. Its first objective should be a minimum service level framework agreement as part of any bargaining council negotiation process. The functions of the committee should include the ratification of essential services agreements and the enforcing of minimum agreements. Ways of identifying problems, resolving them and providing guarantees against engaging in unnecessarily disruptive industrial action should also be included.[439] Naturally, problems would be encountered primarily because both essential and non-essential employees fall within the same bargaining unit whose interests are collectively pursued by the same union.

Realistically, employers find it easier to group all employees together because all public sector workers can easily categorised as essential services employees, who can be easily restricted or even prohibited from going on strike. In essence, the best possible approach is bargaining and negotiation as preludes to determining the minimum service agreement. These conclusions are preliminary as several issues are re-visited in detail within the context of the prevailing conditions in Lesotho and Swaziland.

[439] Ngwako, *Essential Services Concept: ILO Guidelines*, http://www.bw/blogs..php

CHAPTER SEVEN
The Lesotho Perspective

7.1 Introduction

Chapter 6 explored the Botswana situation. The study undertook this task by weaving together a tapestry of the past and the present with reference to the evolution of labour legislation, theory and reality. The exercise brought up certain issues regarding institutional practices and the general perception of the state in action.

The same approach is adopted in this chapter on Lesotho. However, because the Botswana discussion is somewhat detailed, this Lesotho chapter focuses on more empirical evidence that can help us to understand the Lesotho situation in the context of employment relations and labour disputes.

7.2 Background

Lesotho might not have had a labour history path like Botswana's but, in several ways, it bears similar scars from the past. Lesotho, formerly the kingdom of Basutoland, is a tiny kingdom completely surrounded by South Africa. Its growth and history are therefore inextricably linked with both South Africa and Britain, as Botswana was since 1885. Both territories were therefore equally affected by events in South Africa. The Kingdom of Lesotho, or Basutoland, as it was known through in the nineteenth and twentieth centuries, owes its origins largely to the genius of Paramount Chief Moshoeshoe I (1786–1870).

In 1884, Britain resumed direct responsibility for the Protectorate of Basutoland.[440] The political and legal powers of the senior chiefs were largely maintained under the British policy of indirect rule – a situation that lasted well into the 20th century. The British set up a system of dual rule and left considerable power in the hands of the paramount chiefs, all of whom were descendants of Moshoeshoe I. Under these leaders, authority was delegated through ranked regional chiefs drawn from the royal lineage and the most important chiefdoms. A system of customary law was adopted, with the land held in trust by the

[440] http://www.britannica.com/EBchecked/topic/337126/Lesotho.

paramount chief for the people, while crucial aspects of local government were also left to the chiefs. The British administration was concerned primarily with balancing Basutoland's budget, which it facilitated by ensuring that a substantial proportion of the population worked for wages in South Africa.

The local chiefs could do little to halt the increasing social and economic deprivation within Basutoland. Education was left to missionary societies, and there was little development of economic infrastructure or social services. Between 1929 and 1933 the Great Depression coincided with a massive drought, resulting in the exportation of black labour, a phenomenon that drove numbers of able-bodied men into South Africa. The net effect was that the population in Basutoland hardly increased for a decade. In the early 1930s the British attempted to reduce the number of chiefs. During World War II, more than 20,000 Basotho served the British in North Africa and parts of Europe.

On 4 October 1966, when Basutoland received its independence from Britain, it was renamed the Kingdom of Lesotho and headed by paramount chief Moshoeshoe II (named for the nation's founder) as king and Chief Jonathan as prime minister. Executive power was given to the prime minister in 1967. However, it was only in 1950 that the first minor concessions were made to the elective principle in Basutoland, though the British still refused to concede legislative powers. In the background, however, rapid socio-economic and political changes were under way, not only in Basutoland, but in South Africa too. As the self-confidence of educated commoners grew, they began to take interest and play a more prominent role in Basutoland, to a great extent displacing the chiefs as the backbone of society. It was accepted that the paramount chief would henceforth be a constitutional monarch.

At the end of the nineteenth century, mineral discoveries were made in South Africa and their enormous potential laid the foundation for the creation of the Union of South Africa in 1910. In order to acquire cheap labour and to end competition from independent African agricultural producers, the white landowners and mine-owners encouraged the adoption of policies that deprived the indigenous population of neighbouring territories of their social and political rights and most of their land, particularly in Lesotho. That notwithstanding, Sotho farmers took advantage of the markets for foodstuffs in the growing South African mining centres. They utilised new farming techniques to produce substantial surpluses of grain, which they sold on the South African markets.

The migrant labour pattern continued unabated as Sotho workers continued to pour into the mines to sell their labour for cash and firearms. Lesotho's labour history in the twentieth century was thus dominated by an increasing dependence on labour migration to South Africa and increasingly discriminatory and dehumanising legislation. Deliberate policies were crafted so as to normalise arbitrary and exploitative taxation. This situation was worsened by an increasing population growth behind a closed border, the depletion of the soil, and the need for resources to supplement agricultural production. Sotho workers became an important element of the South African mining industry, and Basutoland became the classic example of the Southern African labour reserve, with its people dependent on work in South Africa for their survival. In 2005, there were 52,926 Basotho working in South Africa.[441]

Although opposition to the colonial system grew, no radical political organisation was able to topple the colonial administration and its traditionalist allies. The Sotho were unified, however, in their opposition to Basutoland's incorporation into South Africa and their fear that the British might cede the territory to South Africa without consulting them. During the 1970s Lesotho received an increasing amount of foreign aid in support of its struggle against apartheid South Africa. The funding helped to increase the pace of modernisation and urban development, spur economic improvements in infrastructure, education, and communications, and create a privileged bureaucracy. It failed, however, to alleviate the long-standing problems of poverty and dependence. Thus, although mine wages and payments from the Southern African Customs Union increased in the 1970s, Lesotho was unable to use these revenues productively and remained dependent on South Africa.

7.3 Emerging trends in labour relations and legislation in Lesotho

Political instability, economic deprivation and looming poverty appear to be the current situation in Lesotho. This is coupled with the intransigence of the military. This means that Lesotho was and is still not able to focus on internal labour related issues. This situation is exacerbated by the institutional inability to create and nurture an environment for robust parliamentary debates. This would have provided a window into the relationship between organised labour (such as there is) and the state, as is the case in Botswana.

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[441] Fumane Law *and Labour Market Regulation in Southern Africa: Lesotho in Focus* (2001) (Deputy President of Lesotho Labour Court).

The foregoing was intended to capture a picture of the Basutoland as it was before the advent of modern labour law and progressive external influences. It also dealt with the post-colonial situation. Later developments in Lesotho, specifically from 2000 onwards, have seen the statutory creation of several structures within the labour legislation framework. Among these are the Industrial Relations Council, a Director of Dispute Prevention and Resolution (DDPR) and the Labour Appeal Court. The Labour Code also formalised the positions of the President and Deputy President of the Labour Court. These will form part of the discussions on Lesotho subsequently. Before then, in keeping with the structure adopted for chapter 6, certain conceptual and problematic issues need attention.

7.4 Employment in the context of Lesotho labour legislation

The Roman-Dutch and common-law connotation of the employment contract transcends the borders of most SADC countries, except for minor variations of prescriptive detail. In Lesotho, the employment contract is defined as a contract by which an employee enters the service of an employer. It assumes therefore that, like Botswana, all the other essentials of contract and the particularities of the parties will fall into place.[442]

The Labour Code Amendment Act classifies all employees as workers 'in continuous employment'. This means to be an employee one must be a person who has worked not less than four weeks in each year of uninterrupted service under the same employer, business or management. It therefore also assumes that all the conceptual and doctrinal issues raised in chapter 6 in this regard are germane. These include the determination of employee status, employer prerogatives and the inherent inequalities in the power relationship that underpins the environment of employer–employee relations.

The Labour Code Order excludes members of the Royal Lesotho Defence Force, the Royal Mounted Police or any other disciplined force within the meaning of the Independence Order of 1966 and the Constitution of 1993. The Order then continues by stipulating that no exemptions shall be made. As in Botswana, this exemption runs counter to any ILO Conventions that have 'come into force in the Kingdom of Lesotho'. This provision will be

[442] Part 11(3) of the Labour Code Order of 1992.

revisited later with regard to worker formations and the position of the ILO, much of which has been covered in chapter 6.

The law further defines an employee as anyone working in any capacity under a contract, be it in an urban or rural setting, government department or a public authority.[443] This omnibus definition would therefore suggest a wider net of issues regarding workplace relations, such as dismissals and how these are resolved. It follows then that the multi-faceted approach in chapter 6 relating to the conceptualisation and actualisation of the employment relationship is in order. This is so because the jurisprudential and juridical foundations would be equally applicable. This assumption needs testing, however. This is what the following section does. The study asserts that there is almost no problem at the point of entry into the employment relationship. It follows then that the problems occur mainly during the actualisation of the relationship and until its end.

7.4.1 Termination of the employment contract

In *Nkojane* v *FNB and Another*, the appellant had sought a review of his dismissal. The court ruled that the alleged unfair dismissal was in fact both procedurally and substantively fair. The case revolved around insubordination, the ground on which the applicant appealed. The court found that the appellant had indeed refused to comply with the manager's reasonable and lawful instructions.

The court found further that 'such conduct is so reprehensible that the employer is entitled to take disciplinary measures even if there is no specific rule prohibiting such conduct under the employer's regulations. Common labour law does not permit such conduct.'[444] The application for a review was therefore dismissed with costs as a measure of the court's displeasure for the act of pursuing a clearly frivolous review**.** In this instance, in terms of the facts, the Labour Court was correct in its findings.

[443] Part II: Interpretation and Fundamental Principles.
[444] *Nkojane v FNB and Another* LC.REV/62/2010

TZICC Clothing Manufacturing (Pty) Ltd v President of Labour Court and Another[445] was another application for review. This case raises a number of questions about the employment relationship. This was an application for review of a ruling by the Labour Court. In that case, the Labour Court varied an award by the DDPR by changing the award from reinstatement to compensation. The court held that such conduct amounts to an irregularity. The applicant was therefore ordered to comply with the DDPR award. Furthermore, there is no provision in the laws for a non-legal practitioner to represent a party in a matter before the Labour Appeal Court. The court clarified that s 228E(5) of the Labour Code Amendment Act 3 of 2000 provides that an award issued by the DDPR shall be final and binding and shall be enforceable as if it were an order of the Labour Court.

What this means is that matters pertaining to rights that are covered by s 34 of the Labour Code Order 24 of 1992 should be understood distinctly and properly. With due respect, if the findings of the DDPR on the assumption of proper jurisdiction is not appealable, then concern must be shown because it is also the forum of first instance. It must be said then that justice cannot be done if there is a flawed award. The other issue is the demonstrated possibility of the labour laws, functions and powers being misinterpreted. This can occur even at the level of the Labour Court, notwithstanding good faith. The other concern is whether it would be equitable to find an illiterate, naïve worker guilty in such an instance. It is also necessary to note that, according to the Court of Appeal, no appeals shall lie against any decisions of the Labour Appeal Court.[446] Clearly, simplicity and justice are being sacrificed on the altar of statutory complexity and the jurisdictional confusion of the Labour bench, whose political and juridical responsibilities include building faith and trust in the dispute redress framework. It is quite possible for the regulatory and judicial structures to lose legitimacy.

In *M B Mokubung and Lesotho Flour Mills*[447] the central issue was whether there can be what is known as dismissal on the grounds of the employer's operational requirements. The other issue is whether, assuming such dismissals were unfair, the Labour Court had exclusive jurisdiction to resolve such a dispute. In this instance, the Labour Court did not determine what 'dismissables' are. That notwithstanding, it however concluded that such termination

[445] *TZICC Clothing Manufacturing (Pty) Ltd v President of Labour Court and Another* LAC/REV/156/05/ [2007] LSLAC 15.
[446] See *Muso Elias Ts'euoa v The Labour Appeal Court and Two Others* CA (CIV) No 27, 2004.
[447] LC 22/02.

must be by agreement and the retirement package must be mutually acceptable to both parties in order to avoid the liability for an unfair labour practice. In sum, the court had to determine whether the plaintiff was 'dismissed' under the guise of operational reasons. Termination on operational grounds ought not to be classified as 'dismissal'.

Similarly, in the case of *T Shelane and Mohale Dam Contractors*,[448] the basic issue was whether in a case regarding termination on grounds of redundancy, a claim of unfairness should have been duly lodged before the DDPR as provided for by s 225(6) of the LCO. However, in this case, the question for examination focused rather on whether redundancy should be classified as 'dismissal' in labour law terms. In an attempt to come to grips with this constructive problem, the learned judge referred to retrenchment as 'to cut down, to reduce the number of employees because of redundancy, a superfluity of employees in relation to the work to be performed, lay off a number of his employees.' Further, he quoted Cheadle as saying 'retrenchment means dismissal because the ex-employee is redundant. The redundancy … can be caused by the introduction of new technology, the organization of the business, a rationalization consequent on a merger, a drop in production caused by an economic downturn or any number of circumstances.' It would appear that the South African authors referred to in the court decisions are heavily relied on by the Lesotho labour courts as there is no evidence of further reference to other sources.

Dismissal connotes removal from a job for an offence, or to sack or fire an employee, whereas retrenchment suggests the necessary laying off and the reluctant dispensing with the services of a 'clean' employee. All of these result in an employee being jobless. The issue is that the causal factor must guide the description of the consequential conduct. Even then, assuming retrenchment was dismissal in general common-labour law terms, the courts are enjoined to ensure that the retrenchment process is not abused. The issue of fairness will still be pertinent. Similarly, dismissal under the disguise of operational requirements ought not to be condoned by the courts established to ensure and promote fair labour practice and justice. For example, an approved leave period cannot occur within a termination period ostensibly on the grounds of retrenchment. Neither can a disciplinary hearing be convened after a purported termination of the employment contract on the same grounds of retrenchment.

[448] LC 25/03.

In a normal situation, disciplinary measures that ultimately result in dismissals need to comply with statutory requirements of both substantive and procedural fairness. Therefore, where these are missing, in addition to non-compliance with procedural routes for labour dispute resolution, then the appropriate structures as referred to may intervene (not interfere). This intervention will seek to ensure substantive and procedural fairness or to avert a probable miscarriage of justice. The action taken may be a review or the initiation of proceedings *de novo*. It is submitted then that dismissals, in an ideal labour environment, should deal with disciplinary matters, whether serious misconduct or infractions, but not organisational socio-economic variables for which the employee cannot be faulted. It is evident that the employee is already a victim of capital and its bureaucratic machinery to which he or she has become an unwilling appendage. Therefore:

> [T]he causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstances of the case. Dismissal is an extreme measure and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not have expected to overlook.[449]

In Botswana, very simple matters, such as the refusal to provide grounds for dismissal even though adequate notice was given, are construed as contrary to natural justice and *ipso jure* constitute wrongful and unlawful termination.[450] In the same way, the refusal to give reasons and the failure to convene a disciplinary hearing in the case of even a herd boy constitute unlawful dismissal.[451]

The applicability and effectiveness of such stipulations and juristic interpretations in Lesotho may therefore appear to depend largely on the principal legislative and constitutional framework and the degree to which the courts are prepared to provide a jurisprudential basis for their rulings. In *Makoa v Lesotho Highlands Project Contractors and Others*,[452] the issue was whether the applicant had been dismissed or retrenched and, if so, whether he had been relieved of his duties while on leave. The complainant had been employed without reference to time or duration. Subsequently he was informed by the employer that the enterprise was undergoing restructuring. Rather than retrench workers, they were going to transfer the

[449] *McIntyre v Hockin per Maclennan*, Ontario, CA (1889)
[450] *James Molosankwe & Brightwell Nkambule* v *BTC* [2008] BLR HC
[451] Ibid
[452] *Makoa v Lesotho Highlands Project Contractors and Others* LC/15/94.

employees to areas of their choice. In the same month (on 18 August 1993) a letter of retrenchment was sent to the complainant, which he refused to accept.

He proceeded to go on leave. Upon returning to work, he applied for an extension of the leave days. The leave was denied on the grounds that he was no longer an employee. Apparently, the retrenchment had been agreed to between the trade union and the employer in his absence. This was termed a collective agreement with the workers' union, CAWULE. He said he was not a member of the union and so did not regard the agreement as binding on him. According to the court, where a lawful retrenchment occurs, the court cannot order reinstatement but payment of all outstanding entitlements owed to the affected worker.

In *Tebello Thandazo and Others v Nien Hsing International Lesotho Ltd*[453] an unfair dismissal claim arose from an alleged participation in an illegal strike or unlawful work stoppage. The issue at stake was whether the subsequent dismissal was fair. The applicants alleged that they did not participate in any illegal strike or unlawful work stoppage. The applicants, all former employees of the respondent company, were dismissed for allegedly participating in an illegal strike or work stoppage on 11 December 2009. The alleged unfair dismissal arose from an alleged failure on their part to comply with ultimatums that were issued by the respondent consequent to the alleged illegal strike or an unlawful work stoppage embarked on by the applicants, among others, on the said date. The applicants contended that their dismissal was both substantively and procedurally unfair and sought an order of reinstatement, which was changed to an order for compensation during the proceedings.

The facts were as follows; the applicants of their own accord decided to have a celebration during the lunch hour from 12h00 to 13h00. They indicated to the court that the employer was far from pleased with this celebration, interpreted it as a strike and consequently switched off the electricity. The court found that the employer had failed to prove that the workers had conspired to and did engage in unlawful industrial action. That being so, dismissals should be consequential to disciplinary matters and not with organisational and socio-economic variables for which the employee cannot be faulted. It is evident that the

[453] *Tebello Thandazo and Others v Nien Hsing International Lesotho (Pty) Ltd http://www.lesotholii.org/ls/judgment/labour-court/2009/1*

employee is already a victim of the capital and its bureaucratic machinery to which he or she has become an unwilling appendage.

In *Lesotho Highlands Development Authority v Mohlolo and Others*,[454] the appellants contended that Mohlolo and others should have first approached the Directorate of Dispute Prevention and Resolution in order to qualify to bring the case before the Labour Court. Further, whether the Labour Court *a quo* was competent to grant a condonation had to be determined. The Labour Appeal Court concluded that should the Labour Court have lacked appropriate jurisdiction or overstepped its boundaries, then all other issues regarding *locus standi in judicio* would have fallen into place. The court then proceeded on a lengthy discourse about jurisdiction and the authority vested in specified agencies regarding labour dispute resolution.

In sum, the court ruled as follows:

(a) The Labour Court was created under the Labour Code Order of 1992. In s 25, the Labour Court was vested with exclusive jurisdiction regarding all matters relating to the Labour Code Order.
(b) Further, the Code provides that no ordinary or subordinate court shall exercise its civil jurisdiction in any matter provided for by the Code.
(c) Section 26 provides that the jurisdiction vested in the Labour Court shall not limit the jurisdiction of any other court in criminal cases.[455]

The court then provided a brief history of the Labour Court. As a result of these statutory provisions, the Labour Court was vested with the power, authority and civil jurisdiction. This authority had earlier resulted in a perceived dilution of the unlimited original jurisdiction of the High Court in terms of s 119(1) of the Constitution. The Appeal Court solved the problem when it decided that the Labour Court was free to exercise its jurisdiction from the Code just as the High Court can enjoy its jurisdiction in terms of s 19 of the Constitution.

The court explained that the DDPR was intended as a creature of statute, to attempt to prevent trade disputes from arising or escalating. In addition, its brief is also to resolve

[454] *Lesotho Highlands Development Authority v Mohlolo* LAC (CIV)/07/2009
[455] Ibid 4.

disputes via conciliation and arbitration, to advise employers' organisations, employees and trade unions. The Labour Court functions as a juristic person. That being so, the judge concluded that the Labour Court has exclusive jurisdiction to *resolve* a dispute about the nature of retrenchments (as in this case) and other disputes of right, including unfair dismissals. The forum of first instance is the DDPR which must be approached within six months of the commencement of the dispute.[456] However, by interpretation, s 226 (as amended) enjoins the Labour Court, given its exclusive jurisdiction, to resolve by adjudication all matters listed in the section.[457] This does not eliminate the key role of the DDPR as a statutory facilitator whose role is to shorten the duration of disputes. Its function is intended to be relatively informal and quasi-judicial, and its role is a precursor to appearing before the formal courts.

The court concluded as follows: 'In my opinion, therefore, while the Labour Court has been given jurisdiction *to resolve* dismissal type disputes, the jurisdiction to *settle* such disputes reposes in the DDPR. The DDPR has jurisdiction to attempt to settle disputes before such disputes can be *ultimately resolved by adjudication in the Labour Court*.' For the above reasons, the appeal succeeded with costs.

This suggests that the DDPR should attempt to *resolve* disputes. Its failure to do so would then allow those disputes to be subjected to arbitration prior to litigating at court. It is only then that both the Labour Court and the Labour Appeal Court are expected to *settle* the said dispute. In this regard, to resolve, according to every day usage, means 'to find an acceptable solution to a problem or difficulty' or 'a formal statement of an opinion agreed to by a committee or a council'.[458] On the other hand, to settle means 'to put an end to an agreement or a disagreement.'[459]

It follows then that a resolution could amount to preliminary action taken to arrest a deteriorating situation. This suggests a potential for failure which raises the question of the DDPR being a final decision maker. Obviously, the ultimate forum of last resort is the Labour Appeal Court. From the foregoing, the multiplicity of structures charged with both the resolution and the settlement of disputes may lead to jurisdictional confusion. Such

[456] Ibid 4.
[457] Ibid 5.
[458] *Oxford Advanced Learners Dictionary* 8 edition 1257.
[459] Ibid 1351.

confusion at the level of the employee could be worse than any turf war between the courts. Retrenchments and internal transfers do not form part of the disciplinary regime resulting in the termination of employment. They also do not imply that an employment relationship has to come to an end for this statutory entitlement to mature. At least the employee is protected by the Wages and Conditions of Employment Order of 1974, despite the fact that it has since been repealed. According to s 79, severance benefits are payable to any employee who completes more than one year of *continuous service with the same employer*. Such an employee, on termination, shall receive a severance benefit of two weeks' payment for each year of service.

The issue of compensation as a result of injuries sustained 'out of and in the course' of normal contractual service is another contentious area. This is illustrated by *Labour Commissioner versus The Lesotho Highlands Development Authority and Chief Executive Officer.*[460] In this instance, the applicant was employed by Muela Hydropower Contractors (MHPC) in 1996. Upon employment, he underwent a pre-employment medical examination. The test revealed a pre-existing injury to his right leg which was why that leg was shorter than the other. He stated that the injury in question was not from his current work. Subsequently, he sustained an injury to the same leg when a four-pound hammer fell on the leg. Tests revealed that he had suffered an abrasion, and then a minor contusion, on an already existing leg ulcer.

The employer did not report any of this as did not regard the medical condition as serious enough. In 1998, the plaintiff instituted civil proceedings against the employer. The court ruled that, in terms of the law, any claim for compensation can be made only through criminal proceedings. The employer contested the claims. The court, referring to the relevant law, ruled that such claims should be reported within a period of six months of the date on which the injury occurred. Secondly, an appropriate court may grant condonation after six months but not beyond three years. The claim was thus denied and the case was dismissed. In Botswana, the Workers' Compensation Act has no prescription period. In this case, it would seem that the court was punishing the claimant for what he did not know.[461] This is not to say

[460] Labour Commissioner v Lesotho Highlands Development Authority & Chief Executive Officer Case No. LC 22/03
[461] Workers' Compensation Act of Botswana [Cap 47:03].

that some should be excluded from the dictum that ignorance of the law is no excuse. Each case must be treated on its own merits because that is the essence of equity.

This study argues that the notion of 'severance benefits' should not be tied to the termination of service but to a recognition of dedicated service which may continue. The same problem occurs in Botswana, where the benefits are linked to the termination of employment. However, it is acknowledged that benefits shall be payable after every 60 months of continuous service. Such benefits may be payable at the final termination of the employment relationship if the employee so chooses. This is akin to a gratuity which does not fall due only when the employment relationship is terminated, but according to the specified duration of each period of renewable engagement. It is submitted that most unskilled workers fall victim to unscrupulous employers who terminate contracts prior to the maturity of severance benefits, only to re-hire the same workers to commence another period of continuous service.

7.5 Freedom of association and organisation

A collective labour law environment directly affects the balance of power between political, social and economic forces in varied historical and cultural contexts. This often results in strong resistance to any attempt to tamper with the *status quo*, in spite of the fact that all it suggests is a window of opportunity for allowing progressive and international influences to permeate the closed domestic legal system. The principle of freedom of association is considered a kind of customary rule within common law and independent of any Convention. Such perceptions can, when appropriate, be harnessed and appended to the letter and intent of an international norm or Convention in its quest to influence change.

A contentious area and thus fertile ground for labour disputes derives from the fundamental question of the freedom to form or join workers' associations of one's choice. The exercise of this freedom provides a platform for collective bargaining, and also implies the power to withdraw collective labour power as leverage during negotiations. Freedom of association and the right to organise and collectively bargain owe their generic roots to the very fundamental ILO Convention on freedom of association and the protection of the right to organise (Convention 87), to which Botswana, Lesotho and Swaziland became signatories in 1966. This Convention is intertwined with Convention 98 of 1966, which addresses the right to organise and collectively bargain. Some pertinent issues in this regard have been raised in

both chapters 5 and 6 and need not be reproduced here. However, as events below show, because the state cannot prohibit trade unions completely, it has devised a means of achieving the same result through the ever-increasing net of essential services.

The language of the Conventions presupposes mandatory compliance, once a signatory state has ratified the Convention. In the absence of ratification, or when a state denounces the ratified Convention, it puts itself beyond the reach of the ILO and its moral, doctrinal and juridical persuasive authority. The ILO explicitly accepts that if a state does not ratify its Conventions, there is no means of supervising their application. In addition, the supervisory mechanisms of the ILO will be unable to create room for either the expedited examination of complaints or punitive sanctions.

In effect, the Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association are simply bureaucratic organisations with no coercive power. This also means that notions of public international law and the ILO precepts on these matters are merely doctrinal and moralistic. Therefore, these international standards and their benchmark value need closer examination. This will then be followed by subsequent empirical validation. This is critical particularly because the phenomenon of essential services is under siege.

In this context, siege means the practical usurpation of the concept of 'essential' service and by extension, the curtailment of basic fundamental freedoms. By practical usurpation is meant the fact that some states have seized the notion of 'essential' and turned it into a mechanism for casting their regulatory net wide. In effect, the practical elasticity of the 'essential' has been transformed into a regulatory tool used to harness worker formations. Such conduct is in complete contempt of the ILO and its precepts. The following case is informative.

In *Mapiloko v Pioneer Seed RSA (Pty) Ltd and Others,*[462] the first respondent (R1) was a South African company. The applicant was assigned to carry out his duties in Lesotho under the second respondent (R2). Before then, he had been employed since 1998 by R2 and based in South Africa. This was why a disciplinary was held in Grahamstown, South Africa. His

[462] *Mapiloko v Pioneer Seed RSA (Pty) Ltd and Others* LAC/APN/08/08, {[2009] LSLAC 2.}

contract was terminated by R2 in 2006. The applicant was not satisfied with the termination and challenged it in the Labour Court. The court denied his application. The applicant then challenged the decision of the court, claiming its conduct was *ultra vires* s 28 of the Labour Code Order of 1992.

Subsequently, the issue was raised in an application for review and also for the determination of the question of the jurisdiction of the Labour Court. The court had initially referred the matter to the DDPR, which was considered the correct forum. While the matter was pending at the DDPR, the present case was lodged under s 38A (3) of the Labour Code Amendment Act. The learned judge proceeded to read out the relevant provisions as they affect the authority of the Appeal Court to hear a case without it first passing through the DDPR and or the Labour Court.

iii) … any administrative action taken in the performance of any function in terms of this Act or any other labour law read with Labour Appeal Court Rules 2002 entitled as 'The Court sitting as a Court of first instance--------

Section 14(1) states;

> a) A party may apply to the Judge in chambers, on good cause shown, for a direction that a matter before the Labour Court or the Directorate of Dispute Prevention and Resolution be heard by the (Appeal) Court sitting as a Court of first instance.

In the main, the application for leave to seek a review was based on the grounds that the applicant did not comply with s 69 relating to the submission of written statements about the reasons for dismissal and with s 76 in respect of the accrual of rights on the termination (of the contract of employment), and that this should have warranted the interpretation of s 226 (2) on the resolution of disputes.

The court ruled that, on the facts, the applicant had not made a case to support his application to change the forum without exhausting the preliminary statutory steps. Therefore, he had to return to the DDPR. Again, it would appear that workers are being taught practical procedure, taking into account the time lines imposed on each step to be taken, irrespective of how long it might take to learn how to proceed in the event of disputes.

7.6 Essential services: Theory and practice in Lesotho

The question of essential services is discussed extensively in chapter 6. However, it is instructive to add the following report from Botswana. In June 2015, the state gazetted a Bill informing the public of its intention to repeal the existing Trade Disputes Act [Cap 48:02]. Of critical importance is the fact that the Bill widens the categorisation of essential services to include teaching, all workers in diamond-related services, and the staff of the Botswana Vaccine Institute, among others in the public sector.[463] Effectively, those public sector workers who went on strike in 2011 have all been included in the scheduled list of essential services. As noted earlier, there is no Essential Services Committee in Botswana. Thus the applicability and effectiveness of these ILO Conventions with regard to Lesotho may therefore depend largely on the principal legislative and constitutional framework and also on the ideological orientation of the state.

Furthermore, the effectiveness will also depend on the degree to which the courts are prepared to provide a jurisprudential basis for their rulings. However, the inherent deficiencies of the Conventions as noted earlier in the study need to be acknowledged. Secondly, Convention 87 states that the ratification of the Convention 'shall not be deemed to affect any existing law, award, custom or agreement' that relates to any segments of any state. Since the theoretical and doctrinal issues have been addressed, the next step is to demonstrate the legislative effect on this key area in employment relations.

In the *Lesotho Union of Bank Workers (LUBE*) case, the philosophical premise was whether workers had the right to form and join unions. If they did, then restrictions such as those implied in 'essential services' could be deemed contrary to the principle of freedom of association as enshrined in the Constitution.[464] In this case, the demands of the LUBE workers were as follows:

(a) That the 1991 strike action entered into by the applicant against the respondents be regarded as lawful;
(b) That the 1982 Act passed by Prime Minister Leabua Jonathan that declared banking to be an essential service was *ultra vires*; and

[463] Trade Disputes Act Government Extraordinary Gazette Vol L111 No. 31 (22 June 2015)
[464] *Lesotho Union of Bank Employees (LUBE) v Barclays Bank Plc and Another* (CIV/APN/357/1944).

(c) That a discriminatory and therefore unfair labour practice resulted from the respondents' act of dismissing members of the applicant and subsequently reinstating some to the exclusion of others.
(d) That such act was therefore null and void and of no effect on the members of the applicant as intended by the respondents when some were dismissed.

This application arose out of strike action by members of the applicant on 22 July 1991. What was not contested was the fact that members of the applicant banks had at all material times been employees of the respondent banks, by virtue of contracts of employment entered into at different times between members of the applicant union. What was not at issue was whether it was the Prime Minister and not the Minister of Labour who passed an order in 1982 that declared banking to be an essential service, and, secondly, that the order was to apply retrospectively from 1975 when the Essential Services Arbitration Act of 1975 was passed.

The Order was passed in 1982 as a result of which the applicant's members were given an ultimatum to go back to work or be dismissed. They did not go back to work and were summarily dismissed on 8 August 1991. Subsequent to the dismissals, the respondents announced on the radio that the applicant's members should reapply. Out of those who reapplied, only a fraction were re-employed to the exclusion of the others. The state averred that '[f]undamental collective bargaining was a duty to bargain in good faith that the strike was an essential and integral element of collective bargaining and that when an impasse had been reached in negotiations either party was free to take unilateral action.'

The respondents denied in their affidavits that there had been any effective collective bargaining which they thwarted. Besides the admission of certain factual averments there was neither admission by the respondents, nor was there documentation to prove that there had been collective bargaining which was thwarted by respondents, save that in para 5(e) of their supporting affidavit the applicants conceded that their abstention from work was illegal. The applicant acknowledged that banking was, in 1991, an essential service. That being so, the provisions of Part IV of the Essential Services Arbitration Act 1975 applied to strike actions by bank employees. In terms of ss 16 and 17, strike action was illegal unless the Labour Commissioner first decided that a trade dispute existed.

The court observed that

> [t]he view put forward by LUBE to the Labour Commissioner was that 'both' parties had breached the law.... I would be inclined to agree with Applicant that where the Respondents employed delaying tactics to frustrate the procedure of collective bargaining then Applicant could undertake strike action which would not have been unlawful in the circumstances[465].

Citing a South African case, the judge quoted Goldstone as follows: 'There is nothing so subversive to collective bargaining, however, as to bargain entirely or to pretend to bargain without doing so, going through the motion with no intention of reaching agreement.' Nonetheless, the applicant should have at least attempted to prove these allegations by documentation, especially where the respondents had expressed a vehement denial.

As a general rule, dismissed strikers will only be afforded protection if they employ the strike as a remedy of last resort. The applicant could have argued that the strike action was functional and lawful with regard to collective bargaining law and procedure. It could be functional if it was consistent with the collective bargaining procedure. Citing the case of *NUMSA v Eim Street Plastics* the court ruled that the test to be applied in determining whether the strike was functional and lawful was that the strikers must have negotiated in good faith before embarking on the strike, and they must have reached a deadlock after the negotiations.[466]

The applicant union also sought a declaration that the 1982 Act declaring banking to be an essential service was *ultra vires*. Secondly, if this action by the Prime Minister was found to be *ultra vires* then the strike action would not be unlawful. This was so because, in terms of the Essential Services Act, banking was not an essential service. But if banking was an essential service, then the Act clearly laid out the procedure for addressing the labour dispute, which first had to be declared as such by the Labour Commissioner. In the words of the applicant, the issue was therefore whether the act of declaring banking an essential service by the Prime Minister was *ultra vires* and therefore of no force or effect.

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[465] *National Union of Mineworkers (NUM) v East Rand Gold and Uranium Co. Ltd* 1992(1) SA 700 (A) per Goldstone J.A p734

[466] *Azuwu v Gordon, Verhoef and Krause and Another 1996* (3) BLLR 279 (LC).

In addition, where a statute expressly provided for the functions of a junior minister and not a senior minister, such conduct would be *ultra vires*. The relevant section in the Essential Services Act is s 20: 'The Minister may by notice in the gazette, add any service to, or delete any service from the schedule to this Act.'[467] It cannot be said that in Lesotho, when a minister is delegated a function by the legislature, he or she can ignore the oversight authority of the legislature in relation to the statutory instrument he or she purports to publicise in the gazette.

In 1982, by Legal Notice 21 of 1982 the Prime Minister Leabua Jonathan declared banking to be an essential service. The applicants argued that reference to the 'minister' in the Essential Services Act meant the Minister of Labour. The applicants sought to rely on the authority of the *Carltona* case[468] to contend that the prime minister usurped the powers of the junior minister and that he thus acted *ultra vires.* The applicant did not however go on to challenge the constitutionality of such an act except to rely on the wording of the statute which *ex facie* differentiates between the minister and the prime minister. Authorities abound on the question of *ultra vires* acts. In most cases this issue arises where a delegated or otherwise junior body performs functions that are not permitted by the enabling authority or statute.

The operative word in most cases is proportionality. That is, such act must not be in excess of the given authority. In other words, the person who acts unlawfully must be the one who goes beyond the bounds of his or her authority. Thus, the usurping of a junior authority's powers would be *ultra vires* only if the act itself is repugnant to the authority or statute which is itself an enabling statute to the usurper. Or rather, the exercise of the powers must be beyond or in excess of such authority.[469] The applicant did not even go to the extent of saying that the declaration was tainted because banking could not be an essential service. But it is clear from para 5 of the founding affidavit that if there was any protest at all about the declaration of banking as an essential service, it was by the ILO and not by the applicant. So it can be said that the applicant did accept that it was bound by the 1982 declaration.

According to the court, where the prime minister did not act *ultra vires* and there was no challenge *as to the retrospective* effect of such a declaration, the applicant was bound. That in

[467] *Lesotho Union of Bank Employees (LUBE) v Barclays Bank Plc and Another* (CIV)/APN/357/1994.
[468] *Carltona Ltd v Work Commissioner* 1943 All ER 560.
[469] See *The Dictionary of Legal Words and Phrases* vol 4 2 ed (2002). See also *Est Geekie v Union Government* 1948 (2) SA 502 (N).

effect rendered the strike action unlawful. If the declaration of banking as an essential service could not be attacked under the Essential Services Act then, in 1991, when the strike action took place, banking had properly been declared an essential service and the strike by members of the respondents' staff was illegal.

The court proceeded to rule that the applicant contended that the dismissals were *unlawful*. It did not argue that they were *unfair*. The lawfulness of such dismissals could be determined only by looking at the contracts of employment. That is, legislation had been enacted only to protect employees against unfair dismissal without interfering with the right of the employer to hire and fire. It is trite that, at common law, employers are free to hire and fire subject only to the terms of the contracts between themselves and their employees. The courts will only interfere if the dismissals were in breach of a contractual obligation. The sanctity of a contract in this context was best described by Brassey et al:

> How little the common law feels for commercial rationality is evident from the fact that it does not, in the absence of express agreement to the contrary, require the parties to have good reason for terminating the relationship before they do so. All it demands is that they should time the termination properly and precede it by the requisite notification of notice.[470]

In *Lesotho Union of Bank Employees v The Solicitor General,*[471] the bank workers established that both Barclays and Standard Chartered Banks recognised the union for bargaining purposes. Subsequently, in 1981, the banks reneged on an agreement to implement a new salary structure in keeping with their counterparts in South Africa. The workers then reacted with a letter to the banks and the responsible minister, threatening a strike, which took place in 1982. The minister did not succeed then in effecting a resolution.

Subsequently, he decided to send the dispute to arbitration in terms of s 56(1) of the Trade Unions and Trade Disputes Law.[472] Having rejected the arbitration order, the workers went on strike again on 23 March 1982. On 25 May, the Prime Minister declared all banking services to be essential in terms of the Essential Services Arbitration Act of 1975. Failing to resolve the dispute, the Commissioner sent the dispute to the Arbitration Tribunal for

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[470] Brassey et al *The New Labour Law* (1987) 3.
[471] *Lesotho Union of Bank Employees v Solicitor General and Others* CTV/APN/30/83.
[472] Act 11 of 1964.

settlement. The arbitration did not take place until November 1982 when, by proclamation in the Gazette No 47), the prime minister appointed another arbitrator.

The workers challenged the order, stating that the role played by the prime minister in appointing an arbitrator was irregular and contrary to the Essential Services Arbitration Act.

The banks claimed that, according to the Act, there was no dispute to arbitrate. Secondly, what the workers prayed for was not a matter for arbitration because the issue at stake was one of law, which did not fall in the listed category. The court concluded that both the Commissioner of Labour and the prime minister dealt with the statutory implication on the same day. The Commissioner issued Legal Notice 22 of 1982 on the same day that the prime minister, acting on powers vested in him by s 4(2), appointed an arbitrator. In effect the Legal Notice, emanating from the Act as did the order of the prime minister, could not be set aside. The appeal failed.

Essential services, as observed, have become a source of labour disputation mainly because, as noted earlier, governments appear to have found a hitherto stable environment where they can restrict workers' collectives from flexing their muscles. A classic example is the *ex post facto* retroactive Executive Order in 1982 which arbitrarily re-categorised banks as falling within essential services, and also backdated the order to 1975, when the first law dealing with essential services was passed.

In Lesotho, not all workers have the right to form and join trade unions. Civil servants known as 'public officers', such as the Police Force, the Defence Force, the National Security Service and the Prisons Service, are excluded. However, although the Lesotho Constitution guarantees freedom of association, public employees are prohibited from forming and joining trade unions. They can form or join 'associations' instead, whose role is limited to providing their opinion when such is sought. The government has promised the ILO (CEACR) that the new Public Service Bill will guarantee the right of public workers to form and join any associations authorised to conduct collective bargaining. The law allows unions to conduct their activities without interference.

Unsurprisingly, s 20 of the Public Services Act prohibits the right to strike in the public sector. The CEACR has emphasised that this is a violation of the relevant ILO Conventions

and has recommended that the prohibition be limited only to public servants who 'exercise authority in the name of the State'. In addition to that, there are no compensatory guarantees, such as arbitration procedures, for those workers whose right to strike is prohibited. Finally, the law prohibits strikes in essential services, but the government has not yet listed which services are considered to be essential.

It is noteworthy that the prime minister flouted constitutional norms in his *ex post facto*, retroactive declaration of banking as essential with effect from 1975. This is repugnant to administrative law and practice. Secondly, it would appear that the prime minister felt he could rely on powers delegated to functionaries rather than play a supervisory role. Again the confusion as to who does what and how this is done is dominant in the actualisation of the labour law regulatory framework.

In *Ts'eliso Shelane and Mohale Dam Contractors*[473] the issues were more doctrinal and therefore complex. The matter was reported to the court by the DDPR in terms of s 225(6) of the Labour Code, as amended. The applicant claimed his dismissal was motivated by malice and was not necessary on the grounds of redundancy, and could therefore not be justified as part of operational re-structuring. In fact, as he alleged, the same job was given to his colleague to perform. Therefore, he believed that he was dismissed unfairly.

Quoting s 66 of the Labour Code Order, he indicated that any dismissal had to comply with the requirements stipulated therein. The key issue was that, if his position had indeed been declared redundant, then no one should be performing his job again. He viewed the issue as either a dismissal or a termination. Citing a South African case, the judge explained retrenchment as '[t]o cut down, to reduce the number of employees because of redundancy – a superfluity of employees in relation to the work to be performed. Retrenchment does not necessarily involve the abolition of a "post": the employer may merely lay off a number of his employees.'[474]

He proceeded to explain that the employer was only rationalising his resources. He may continue with the same business but may engage fewer hands. Quoting Cheadle, he said:

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[473] *Ts'Eliso Shelane and Mohale Contractors* LC 25/03.
[474] *Consolidated Frame Cotton Corp v The President, Industrial Court* (1986) 7 *ILJ* 489 (A) at 494 per Nicholas AJA.

> [R]etrenchment means dismissal because the employee is redundant. The redundancy … can be caused by the introduction of new technology, the organization of the business, a rationalization consequent on a merger, a drop in production caused by an economic downturn or any number of circumstances.

As asserted earlier, dismissal as it is commonly understood means to remove from a job for an offence, or to sack,[475] whereas redundancy is a situation where the employee is no longer needed at work due to the insufficiency of work.[476] Grogan defines a dismissal as 'when the contract of employment is terminated at the instance of the employer'.[477] Effectively therefore an employee can hardly dismiss him- or herself but he or she can end the employment contract on his or her terms.

As earlier asserted, retrenchment is not dismissal as it does not connote disciplinary action of sorts. An employer who is forced to let his workers go as he cannot pay them anymore cannot claim he has dismissed those workers that he has come to value. In the current case, time-keeping was not a job requiring any particular skills with a permanent post attached. Anybody could do such a job and what the employer did was to combine the job with others that anyone could do. In view of the evidence adduced, the court ruled in favour of the employer. What is evident in this case is the apparent conflict between dismissal, retrenchment and redundancy as proffered by the experts. Obviously, the lot of the employee would be dismal. Such could be the situation between those referred to as statutory and authoritative institutions and the defenceless position of the naive and probably misinformed employee.

7.7 Other provisions of the Labour Code

Section 168 of the Labour Code Order provides that all employees and employers in all sectors of the economy, including those in agriculture, shall enjoy the right of association and combination as workers. In terms of the Constitution, every person shall be entitled to, 'and, except with his own consent, shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, religious, political,

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[475] *Longman's Dictionary of Contemporary English* 8th Edition (2010) 293.
[476] Ibid.
[477] Grogan *Workplace Law* 7 ed (2003) 104.

economic, labour, social, cultural, recreational and similar purposes'. However, as in Botswana, the Constitution then immediately imposes restrictions on the exercise of these rights of formation and membership emanating from any law whose purpose is to secure defence, public safety, public order, public morality or public health as shall be so defined. Impliedly, therefore, this freedom can also be denied on the same grounds.

The Lesotho Constitution also provides for imposing restrictions on public officers with regard to unspecified conduct and areas of freedom of association and freedom of peaceful assembly ('without arms'). Freedom of association appears to be differentiated from freedom to assemble or to combine collectively, which ought to be the defining essence of the actualisation of the freedom of association.

7.7.1 Institutions and labour legislation

The Labour Code Order is described as a law intended to restrict the 'right of freedom of association, as enshrined in numerous regional and continental treaties and standards.' [478] With due respect, this sweeping statement is misleading if not fallacious.[479] Freedom of procession and marching is not equivalent to meeting for the purpose of conferring or deliberating at a designated forum. Neither is it assembly. Freedom of assembly is consequential to the existence of an association but is not the rationale for associating. As in Botswana, there is a critical need for the state and its functionaries to understand that strikes are legal and are the legitimate expectation of workers. It is part of their legal, inherent and inalienable right.[480]

This includes the right to collective picketing or the right to down tools. The concept of 'no work, no pay' does not cover lawful and protected strikes. Strikes do not necessarily degenerate into violence, vandalism and the manhandling of scab workers. Further, no clear distinction has been made between association, assembly, and identifying with, sharing or

[478] Section 2, Interpretation, Public Order Act [Cap 22:02].
[479] See s 7(3) of the Constitution of Lesotho. Section 16(2) *(a)*, *(b)* and *(c)* prohibits certain forms of association.
[480] Section 225 deals with the procedures for dispute resolution. Section 229 provides the conditions for a protected strike.

advocating a particular position.[481] The Labour Code Amendment Act and the Public Service Act have been clothed with the authority to regulate employees in respect of unionisation.[482]

Most Constitutions make this distinction and authority is granted to law enforcement authorities to issue permits.[483] In Botswana the Constitution refers to freedom of assembly and association, but not procession,[484] and the Constitution of Namibia refers variously to the freedom to assemble peaceably without arms and specifically to freedom of association, which shall include the freedom to form or join trade unions or unions, including trade unions and political parties.[485] Similarly, it refers to the freedom to form and join associations, trade unions and political parties.[486] The Labour Code (Exemption) Order and the Public Service Act expressly prohibit 'public officers from associating freely or joining political parties.'[487] The Labour Code Order as it currently stands has put in place a complex maze of procedures before a union can officially declare a strike.

In practice, there have not been any official strikes in the country for many years, but only a few spontaneous protest actions. Such actions are technically defined as illegal; thus, they pose the risk of dismissal to any worker who takes part. The unions need to register at the Registrar's Office in order to be recognised. Each year the government reviews non-functioning or non-compliant unions and deregisters them. The Ministry reported a total of 40 deregistered unions during 2006 and 2007; they were deregistered for failing to submit annual reports.

In terms of the law, collective bargaining is recognised only for trade unions that are representative enough.[488] The Labour Code Order defines a representative trade union as 'a registered trade union that represents the majority of the employees in the employ of an employer'. Section 198A 1*(c)* specifies that 'a majority of employees in the employ of an employer means over fifty (50) per cent of those employees'. The state of affairs when no union covers more than 50 per cent of the workers has yet to be clarified.

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[481] Section 16 of the Constitution of Lesotho.
[482] Labour Code (Exemption Order) 22 of 1995.
[483] Section 13(1) of the Constitution of Botswana.
[484] Section 13(1) of the Constitution of Botswana.
[485] Article 21(1) *(d)*.
[486] Article 21(1) *(e)*.
[487] Labour Code Order Part 111, Division D and Part V not to apply to Public Officers.
[488] Section 198 A 1 *(b)*.

The exercise of collective bargaining meets particular difficulties in the education sector, where the Lesotho Teachers Trade Union's long-standing disputes have been pending before the High Court for 11 years. Additionally, the Ministry of Labour prevented the Congress of Lesotho Trade Unions (COLETU) from taking part in the work of the commission in charge of setting wages, which is supposed to be a tripartite body.

The right to strike is recognised only in the private sector, after an exhausting procedure. The rights to freedom of assembly are generally respected, with some exceptions, such as the June 2007 curfew, which lasted a week and featured military deployments and roadblocks in the capital, Maseru. Moreover, in 2005, the Congress of Lesotho Trade Unions accused the police of denying workers permission to celebrate May Day by holding a parade, on the grounds that the celebrations coincided with local government elections. There is no mention of the physical act of engaging in processions.

It is accepted that strikes are virtually impossible in Botswana, Lesotho and Swaziland. Violations are so serious and widespread that they certainly have a negative impact on wages and working conditions in every undertaking. In Botswana, the Public Order Act is the only statute dealing with a public procession, which the Act defines as a 'procession in, or through, across or along a public place'.[489] Only a police officer may grant a permit for such a procession, imposing a subjective restriction or prohibition on a public procession. This is why people are seeking the repeal of the Act.[490] To do this, the structural context needs to be properly located.

In the preamble to the Lesotho Labour Code Amendment Act of 2000[491] the key innovations are the promotion of labour dispute prevention and settlement at the source, the integration of mediation, conciliation and arbitration into the dispute settlement system, the autonomy of the dispute settlement machinery, the establishment of a Labour Appeal Court, and stakeholder participation in the administration of the system. Specifically, this entailed arrogating to the minister the powers of intervening in and preventing labour disputes that might erupt into national crisis, by appointing conciliators.

[489] Section 2, Interpretation, Public Order Act [Cap 22:02]
[490] Richard 'Lesotho Must Increase Citizenship Participation' *OSISA-AFRIMAP* March 2013.
[491] Supplement No. 1 *Government Gazette* No. 30, 25 April 2000.

The Act also authorises the minister to cause to be published non-binding codes of good practice, model agreements and guidelines to assist the courts and arbitrators. In pursuit of the overall aim of labour justice and industrial harmony, the Labour Court system was created. All its functionaries, including the registrar, are appointed by the Judicial Service Commission in consultation with the Industrial Relations Council as the embodiment of the tripartite system of industrial relations, intended to bestow legitimacy on the dispute settlement processes.

7.7.2 The Labour Court

The Labour Court is established as a court of exclusive civil jurisdiction in terms of powers given under the Act. Its jurisdiction covers the determination of the rights and duties of employees, providing appropriate relief and, in the case of trade disputes, the rescission of contracts of employment, fixing the value of services and quantum of compensation, and the authority to commit offenders to jail terms and to penalise (s 24). Regarding trade disputes, the Labour Court has exclusive jurisdiction over disputes of right covering the interpretation and application of the Labour Code, unfair labour practices, unfair dismissals due to strikes, lockouts and operational requirements. Certain disputes need to go through the prior process of arbitration. This generally includes all disputes of right, which are subject to DDR pre-conciliation procedures.

The creation of a Labour Appeal Court is a logical corollary to these reforms. The court co-opts a judge of the High Court as its presiding officer, assisted by two assessors, all appointed in consultation with the Industrial Relations Council. While the judge holds sway on matters of law, a majority decision is sufficient for matters of fact. Essentially, the Labour Appeal Court is intended as a court of finality in matters proceeding from the DDR through the Labour Court to the Appeal Court, and attracts all the procedural and substantive provisions relating to such judicial structures (s 38).

These officers of the Labour Courts may not be holders of office in the public service. The emphasis is on the independence and impartiality of the Labour Court. To buttress this, the Act elevated the Labour Court to a subordinate status to the Labour Appeal Court and generally refers matters from the DDPR to the Labour Appeal Court for final settlement. In

effect, the DDPR must necessarily be the forum of first instance for conciliation and mediation within a statutory period, before the dispute proceeds to arbitration, adjudication or industrial action. This is supposedly intended to close the door to forum shopping with regard to labour dispute resolution.

7.7.2.1 The battle for recognition

The Labour Court system initially received a cold shoulder from the formal courts as they regarded the Labour Court as usurping their constitutional powers and authority. *Motaung v National University of Lesotho and Others* was a case brought before the High Court[492] in which the applicant sought a review of a case of unfair dismissal. The applicant averred that the correct forum for the case was the High Court as a court of original jurisdiction. This was after the case had hitherto been dismissed and redirected to the DDPR or the Labour Court according to the provisions of the Labour Code Order of 1992 and the Labour Code Amendment Act of 2002.

The court commented that matters regarding the proper forum for cases such as the one in question had been brought before the High Court and the Appeal Court. Reference was made to s 66(1), (2) and (4), as well as to s 25(1) of the Labour Code Order. These references were with regard to matters of dismissal of employees. This was followed by a lengthy quote of s 25. The gist was that exclusive jurisdiction had been conferred on the Labour Court regarding any matters covered by the Labour Code. Therefore, the High Court cannot invade that jurisdiction, and the application amounted to a review of a Labour Court decision, which was explicitly excluded.

The learned judge, referring to earlier decisions, stated that s 119 of the Constitution grants the High Court unlimited jurisdiction, including the power to review the decisions of any inferior court or any judicial, quasi-judicial or public administrative proceedings. The question then was whether the Labour Court is a tribunal performing judicial functions. This means it must have been created by Parliament as a specialised tribunal. The Appeal Court later declared that ‘in matters provided for under the Code, the High Court has no jurisdiction

[492] *Motaung v National University of Lesotho and Others* (CIV/APN/182/06).

and only the Labour Court has jurisdiction'.[493] If the High Court were to entertain such cases, this would only encourage forum shopping.

For the purposes of this study, a case of unfair dismissal ought not to become an opportunity to debate legalities such as matters of jurisdiction or the fine constitutional differentiation between a court of law and a 'tribunal' vested with exclusive jurisdiction to deliver justice through the application of law and equity. In addition to the labour courts, there is a whole range of statutory administrative structures whose overall purpose is to prevent, manage or resolve labour disputes. These include the National Advisory Committee of Labour (NACL) and the National Advisory Council on Occupational Safety, Health and Welfare, (NACOSHW) and the Labour Code (Conciliation and Arbitration) Guidelines and the DDPR regulations. However, the wage bill of such a multiplicity of field functionaries is a drain on the resources of a country such as Lesotho.

7.7.2.2 The industrial relations council

The following section briefly summarises the issues examined above. The IRC is, to all intents and purposes, a quasi-political/administrative oversight entity. It is constituted as follows. The minister appoints members for government, for employers in consultation with the National Advisory Council on Labour (NACL) and for employees after consultation with their representatives on the NACL. The IRC's role is to advise on the qualifications and appointment of judges, assessors, the director of the DDPR, conciliators and arbitrators; to make relevant rules and recommendations on codes and fees for conciliation staff; to make general improvements to dispute prevention and resolution; and to prepare annual reports for the NACL and the minister.

In composition, the IRC is more like the National Employment, Manpower and Incomes Council of Botswana (BOCCIM) now known as Business Botswana, The functions of the IRC are more like those of the Labour Advisory Board in Botswana. The NACL has little functional relevance even though it has a higher status than the IRC. As said, the IRC is an advisory body. It is therefore not charged with hearing and, resolving disputes.

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[493] See *Attorney General v Lesotho Teachers Trade Union and Others* (C of A) 1991–1996 (1) LLR 16 at 25. See also *Lerotholi Polytechnic and Another v Lisene* LAC/CIV/05/2009.

7.7.2.3 The Directorate of Dispute Prevention and Resolution (DDPR)

The DDPR is regarded as a juristic person, independent of government, political parties and other social partners (s 46B). It is intended to house conciliators and arbitrators who are appointed by the minister on the advice of the Industrial Relations Council, the Minister of Finance for the financing of its activities through parliamentary votes. It is similar to the provisions of the Trade Disputes Act in Botswana. There, a panel of conciliators, mediators and arbitrators established by the minister are under the overall control and supervision of the Commissioner of Labour.[494]

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The core functions of the DDPR in Lesotho are the prevention and resolution of trade disputes through alternative dispute resolution mechanisms, including arbitration, advice to employers and employees, statistical and educational data creation, and dissemination. Essentially, it is the forum of first instance. It ensures that no dispute reaches the Labour Court without its intervention. It concentrates on disputes as categorised below.

a) **Disputes of interest**

The Labour Code Order defines such a dispute as a trade dispute concerning a matter of mutual interest to employees. Section 225 places the responsibility for settling such disputes on the DDPR with the following conditions:

1. The dispute must be referred to the DDPR in writing, with proof that all parties have been duly served with copies. The director shall then appoint a conciliator to settle the dispute within a 30 day period.
2. If the dispute is resolved, the conciliator shall issue a report signed by all the parties.
3. In the event of a failure to conciliate within the 30 day period, the conciliator shall issue a report so that the dispute can then be referred for arbitration, subject to the consent of all the parties, or, where they fall within the essential services categorization, in terms of s 232(1). Although it is advisable to issue the report in the presence of the aggrieved party, unjustifiable absences may warrant the issuing of any report at the expiration of the statutory period.

b) **Disputes of right**

[494] Trade Disputes Act [Cap 48:02] Part 11 (s 3) of Botswana

Disputes of right are defined as disputes concerning the interpretation and application of the Labour Code Order or any other labour law, or collective agreements, or contract of employment. The Labour Code Order confers exclusive jurisdiction on the Labour Court for the adjudication and resolution of labour disputes. Section 226 provides that this jurisdiction comprises the following:

1. the application or interpretation of the provisions of the Labour Code Order or any other labour law;
2. unfair labour practices;

7.7.3 Settlement of disputes of right in Lesotho

Section 227 of the Labour Code Order provides that any party to a dispute of right may in writing refer such dispute to the DDPR once the issue is one of unfair dismissal within six months of such event. All other disputes must be referred within three years of such dispute arising, with the proviso that the DDPR may, on reasonable grounds, condone a late referral. The Act enjoins an arbitrator to first attempt to resolve the issue by conciliation before proceeding to arbitration.

Secondly, even if the dispute may ultimately be referred to the Labour Court, there must be a demonstrated attempt to conciliate. Conciliation as a basic ADR process must precede arbitration and subsequent adjudication and settlement by the Labour Court system. This is conclusively mandatory with conciliation, mediation, and arbitration being dispute resolution roles apportioned to the same functionaries within the labour relations system.[495]

7.7.4 Arbitration awards and the powers of the arbitrator in Lesotho

The arbitrator or conciliator shall issue a reward in the event of a successful resolution of the dispute. In addition, he may postpone a hearing, dismiss a referral, or make appropriate steps such as will give effect to a collective agreement, proper interpretation of relevant rules and applicable legislation so as to actualise the Labour Code Order, reinstate or re-employ, and to prescribe compensation or award. The Director must provide written reasons 30 days after the award and enable the DDPR to serve copies on the parties and file the original with the

[495] Section 227(2) to (5).

registrar of the Labour Court. He or she may issue final and binding awards enforceable by the Labour Court and vary or rescind an award on the grounds of error, ambiguity or a mistake common to the parties.[496] In terms of s 228F, the Labour Appeal Court may entertain appeals against awards by the DDPR applied for 30 days after the award.

While the job title differs, both the DDPR in Lesotho and the office of the Commissioner of Labour in Botswana perform essentially the same functions. The major difference, however, is the specific statutory roles expected of the DDPR in Lesotho. In Botswana, under the Trade Disputes Act, a panel of mediators and arbitrators is established whose membership, terms and conditions and tenure shall be determined by the minister. The panel is chaired by the Commissioner, who is empowered to direct and control the same.[497]

In this regard, where the Commissioner apprehends or has reason to suspect the likelihood of a dispute, he or she may intervene by delegating a mediator to provide the disputing parties with advice and training in the design of in-house procedures for dispute prevention and resolution, the recognition of trade unions, the design and content of collective agreements, and codes and procedures for discipline and the termination of contracts of employment.

By so doing, the Commissioner has diffused authority of a quasi-judicial nature for a civil servant, which includes determining which disputes should go through the preliminary processes of alternative dispute resolution. There are other statutory structural and procedural similarities and variations. In Botswana, a party to any trade dispute may refer the matter in the prescribed form to the Commissioner or a delegated labour officer within 30 days if the dispute concerns the termination of employment, with a copy served on all parties concerned. An illiterate employee must be assisted by the labour officer to put his or her grievances into writing. The Trade Disputes Act therefore does not specifically categorise such a dispute as only deserving of arbitration. However, the Act enjoins the Commissioner to investigate, or cause to be investigated, the substance of the dispute and set in motion the appropriate modalities for the resolution of the dispute.

In fact, the Act provides that the Commissioner shall appoint a mediator to attempt to resolve the matter, using his or her discretion to determine the venue, time and date, and the details of

[496] Section 228E.
[497] Section 2 of Part 11 of the TDA 15 of 2004.

the grievance as adduced in written form, and the modalities and the number of meetings within the 30 day period, subject to extensions as provided for by a collective agreement or inter-party consensus. That notwithstanding, the Commissioner may resort to direct arbitration where any part of the Act or the consensus of the parties so dictate.[498] In the event that such mediation fails, the Commissioner may refer the dispute to arbitration or to the Industrial Court.

There is no implication of automatic reference to either arbitration or to the Industrial Court. It follows therefore that the determination of the mediator must first be known and his or her decisions are subject to appeal to the Industrial Court. However, for this to happen, the mediator must first issue a certificate of failure to settle.[499]

7.7.4.1 Arbitration awards and the powers of the arbitrator in Botswana

In terms of s 9 of the Trade Disputes Act, the Commissioner shall refer a trade dispute to arbitration where the parties have so requested, where the parties are from an essential service, where the dispute is one of interest, and where the Industrial Court has so directed the Commissioner. Pursuant to this, the Commissioner shall consult with the parties, assign an arbitrator from the panel, determine the venue, date and time for the proceedings, and provide any relevant advice. The arbitration process also has a 30 day period, during which time all other dispute resolution methods could still be kept open.

The important element is that the arbitrator makes an award for a specific period of time, so that such an award can be rescinded if necessary, as is the case in Lesotho. Ultimately the arbitrator makes a binding award that has the same force and effect as an order of the Industrial Court and shall be so enforced as a judgement order. Therefore, such arbitral awards may be appealed against in the Industrial Court.[500] Finally, the Industrial Court President may, after consultation with the minister, publish rules for the conduct of arbitrations under the Trade Disputes Act outside the framework of the Arbitration Act as principal legislation. The implications of the provisions will be discussed in due course.

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[498] Sections 7 and 8 of the TDA.
[499] Section 8(7) and (11).
[500] Section 9(12) and (13).

7.7.5 Pertinent issues

In Lesotho, workers have the right to form and join trade unions, except for civil servants known as 'public officers', such as members of the Police Force, the Defence Force, the National Security Service, and the Prisons Service.[501] Public employees can form or join 'associations' instead, whose role is limited to providing opinions when these are sought. The government had promised the ILO (CEACR) that the new Public Service Bill will guarantee the right of public workers to form and join any associations authorised to conduct collective bargaining. In simple terms therefore, the Labour Code has not categorically abolished or prohibited the formation of unions. This ought to indicate that typical union activities will not be circumscribed with other forms of regulatory measures. That said, reality might prove otherwise.

For example, s 20 of the Public Services Act[502] prohibits the right to strike in the public sector. The CEACR has emphasised that this is a violation of the respective ILO Conventions and has recommended that the prohibition be limited only to public servants who 'exercise authority in the name of the State'. In addition to that, there are no compensatory guarantees, such as arbitration procedures, for those workers whose right to strike is prohibited. Finally, the law prohibits strikes in essential services, but the government has not yet listed which services are regarded as essential.[503]

In Lesotho, civil servants are prohibited from joining trade unions.[504] That being so, since they cannot join trade unions, they cannot strike as individuals. There are unlawful and lawful strikes. Preventing the lawful strike using accepted procedures leaves no choice but to take the unlawful road. In Botswana, Lesotho and Swaziland, lawful, protected strikes are virtually impossible.

It has been suggested that, in Lesotho, there have been repeated violations of labour rights by enterprises in the Export Processing Zones, which has a major impact in turn on the prices of exports as production falls. These violations of trade union rights impede trade union activities and deprive millions of workers of a tool to achieve a fairer distribution of income

[501] Constitution of Lesotho 1993.
[502] Section 20(2) of the Public Service Act 1 of 2005.
[503] *Lesotho Union of Bank Employees v Solicitor General and Others* CTV/APN/30/83.
[504] Supra.

and an escape from poverty.[505] The ratification by Lesotho of the ILO Convention on Freedom of Association and Protection of the Right to Organise No 98 of 1949 and the ILO Convention on the Right to Organise and Collective Bargaining No 87 do not appear to have had much impact. However, the levels of unionised workers remain low, representing some 2 per cent of the national workforce, producing a combined membership for functioning trade unions of 25,070. [506]

Although the labour laws prohibit discrimination against unions, many employers are said to ignore this and deny union organisers access to industrial premises to recruit, discuss, organise or represent workers in disputes. Threats of dismissal are common, particularly in domestic industries, while the textile and apparel sector unions have reported that their members are treated unfairly in order to compel them to leave.[507]

One of the tacitly endorsed areas of poor labour practices is the Export Processing Zones. Lesotho has eight export processing zones, which employ 44,000 workers and consist mainly of textile and pharmaceutical companies. In the export processing zones there are apparently a growing number of petitions, complaints and reports filed against the practices of textile employers from South Africa, Hong Kong and Taiwan, who ignore national legislation, pay wages below the statutory minimum,[508] and make use of intimidation practices to prevent union membership, including the export sector. In Lesotho, the correlation between violations of workers' rights and the existence of export processing zones demonstrates a clearly negative influence of international trade and investment on workers' rights. This is not what the African Growth and Opportunities Act was intended to achieve.

7.8 Conclusion

The government of Lesotho needs to enable the proper exercise of trade union rights by lowering excessive requirements for union formation and registration, and by lowering the percentage of representativeness that grants a union collective bargaining rights. The promotion of collective bargaining instead of compulsory arbitration, and the taking of

[505] Extracts from the 2009 Report for the World Trade Organization (WTO) Council 'Review of Trade Policies of the Five Countries of the Southern African Customs Union (SACU)'.
[506] Ibid.
[507] Ibid.
[508] Equal pay for equal work. (Employment and Equal Remuneration). Convention No 111 (1958)

measures to ensure that collective agreements are applied are definitely more desirable. Lesotho, in particular, should grant civil servants the right to organise by ensuring that anti-union discrimination provisions in its new Public Service Act are examined again, as in Botswana.

In keeping with the historical antecedents, the state in Botswana, Lesotho and Swaziland demonstrates a fixation with unionisation. Therefore, instead of loosening its grip on worker formations, the state appears to be devising methods of further restrictions. Ideally, the state and the government should simplify the procedural requirements for declaring a strike. Ideally, the state should also amend any anti-discrimination and equal remuneration legislation in order to bring it in line with the respective ILO Conventions, thus acceding to the CEACR's requests.

What is clear is that institutional structures have been established to improve employment relations and the atmosphere of work, thus allowing for peace and stability. This is the intention as captured in the preambles of the Bills preceding the formal amendments. It appears, however, that the multiplicity or plurality of structures claiming authority from the same sources creates serious confusion. The lines are blurred and institutions appear to be replicating each other's functions.

Such situations create anxiety and generate insecurity. For the state, the public sector wage bill will escalate. It becomes impossible for the workers to familiarise themselves with rules and procedures. Ultimately, distrust of the system can result in the internalisation of grievances. The price might be periodic episodes of explosive anger with its attendant consequences for both the employees and the employer.

CHAPTER EIGHT
The Swaziland Perspective

8.1 Introduction

This chapter is the last of the inventory of institutionalised structures, their evolution, the legal frame work within which they operate, and the ground realities of labour dispute resolution and settlement. Chapter 7 examined Lesotho using this contextualised approach. In keeping with the structure of this study, an overview of the history of labour legislation in Swaziland prefaces the discussion in this chapter. This provides not only a historical setting but also a better understanding of Swaziland as it grapples with emerging trends, and the challenges and realities of labour dispute resolution.

In many ways, the colonial situation in Swaziland mirrors the origins and evolution of labour legislation and relations in what was then Bechuanaland. During this period, the inclusion of Swaziland within the High Commission Territories (HCTs) was established in terms of the Swaziland Order-in-Council of June 1903. Swaziland had earlier been annexed in 1868 by the South African Republic.[509]

Without any substantive administration either from the British or the Boers, the King used 'concessionairing' as a trade-off for stability and security. The consequence of this was that the most viable areas of land were handed over to expatriates. These expatriates, while achieving freehold rights, created the impression of being tenant-beneficiaries of usufructs. These usufructs consisted of large tracts of Swazi land. The helplessness of the territory in the face of the Boers or 'Free-Booters' resulted in the Conventions of 1881 and 1884. By using these, both Britain and South Africa sought to reach a common ground for guaranteeing the safety of Swaziland, as was the case in Lesotho.

The British went on to abdicate responsibility for Swaziland while South Africa considered itself inherently entitled to Swaziland. There was no proven justification for this entitlement, apart from access to rail, surveys, telegraphs, postal services for the mineral and sugar cane

[509] Dundas & Ashton *Problem Territories of Southern Africa: Basutoland, Bechuanaland Protectorate, Swaziland* South African Institute of International Affairs BNB 342 Government Archives, Gaborone (1952).

concessions, and, above all, access to the sea. The usurping of communally owned land was justified as returns on assistance allegedly given to the King of Swaziland. Thus, the fate and future of Swaziland came to depend on the changing fortunes of both South Africa and Britain, as epitomised in the outcome of the Anglo-Boer war. It is important to note that these developments were the precursors of modern Swazi labour relations. To this may be added property accumulation, whether by one individual, the King and the *iNgwenyama*, or the coalition of the traditional elite. For this study, all these factors are essential ingredients in modern labour disputes in Swaziland. [510]

8.2 The legal evolution of Swaziland

In 1893, the Organic Proclamation conferred administrative and suzerain authority on South Africa with the consent of the Queen Regent (*Ndlovukazi)* of the Kingdom. In 1894, South Africa took complete control until her defeat in 1899. By 1903, the jurisdiction of the Crown over Swaziland had become established. Britain's interest was essentially to protect British economic investments from 'uncivilised' conditions.[511] Though all the HCTs were administered externally from the HCTs' seat of government in the Cape Colony, the difference was essentially the dual nature of internal governance in Swaziland. This was occasioned by the large expatriate, white economic class.

This white economic class realised that, in order to sustain the *status quo*, it had to enter a coalition with the traditional elite. The genesis of Swaziland's labour laws thus lay in the perceived need to contain and accommodate socio-economic changes. These were perceived as likely to flow from the economic disparities that expropriation would produce. Subsequently, what was being pre-empted did occur and is still taking place.

The Concessions Partition Proclamation of 1907 gave indications about the intent of colonial administrative policy. From 1909 to 1914, a moratorium was placed on the expulsion of natives from the concessions. After this period, the terms of tenancy were privately negotiated between landless peasants and their new economic masters.[512] This was the

[510] See s 211 of the Constitution of the Kingdom of Swaziland Act (2005). Land is vested in the King and the *iNgwenyama* in trust for the people of Swaziland. The royal family are not subject to taxation for any property they may acquire, whether fixed, real or movable, private or public.
[511] Ibid.
[512] BNB 449, National Archives, Gaborone, Botswana.

colonial administration's way of solving the land problem by transferring responsibility to a settler community that would require the coercive presence of the state to sustain its hold on the land. The landless native Swazis became aggrieved about the loss of their birthright and their link with the ancestors.

Most particularly, the loss of a sense of identity caused by land expropriation had a traumatic effect on the natives. It also rocked the economic, political and social foundations of Swaziland, leaving long-term consequences. Ultimately, in 1913, Proclamation 24 resulted in the outright removal of natives from the farms. They could do nothing because they had not negotiated any forms of tenure with the expatriate owners of the concessions. They became dislocated, landless and homeless in an environment that had until then ensured communal subsistence agriculture.

The Swaziland Native Administration (Consolidation) Proclamation 79 was passed in 1950 to curb the powers of chiefs and to create agencies of local government through the Swazi National Council or *Sibaya*, which formed the highest policy and advisory council of the *Libandhla* system. Thus the King also became the Paramount Chief of Chiefs charged with effecting indirect rule. The King cautioned against the unleashing of 'too forceful winds of change'. He then proposed a race-federation amounting to a coalition of the aristocratic elite, white settlers and South African support, which would effectively entrench a dual legal and socio-political system.

This was similar to but without the privations of an all-out apartheid system.[513] In 1962, in reaction to simmering racial tensions, the Race Relations Proclamation was passed. Affairs took a dramatic turn at this point with the formation in 1962 of the Mbandzeni National Convention (MNC). Its purpose was to form a single, national, territorial and organised labour centre under the King, in order to pre-empt the formation of unions. In 1966, Sobhuza was finally recognised as King with full rights of internal self-rule.[514]

8.2.1 The legal framework

[513] Ibid.
[514] BNB 449.

The Removal of Natives from the Concessions Proclamation of 1913 indicated without any doubt the kind of protectorate envisaged for Swaziland. Five hundred concessionaires had been identified as forming the core of the landed aristocracy. Of these, 60 per cent resided in Swaziland as the white capitalist segment of the society.[515] In essence, by 1960, Swaziland had become a territory where 40 per cent of landowners were absentee landlords and 'weekenders'. They were a collection of white and Boer farmers who were chronically averse to change and who described both politicians and unions as 'communists', 'demagogic' and 'power-grasping'.[516]

In terms of the Special Levy Proclamation 7 of 1947, native males were forced to pay a levy of 20 shillings. In a hitherto non-capitalist community, which depended largely on subsistence farming and barter, this levy contributed to the externalisation of labour. This in turn caused the dislocation of families as the males were herded into the mines in South Africa.[517] The regime of laws was for the most part the same for the three HCTs, which had identical judicial systems. These were later headed by a HCT Court of Appeal established by an Order-in-Council in 1955. It is important to remember that although judges, in theory, do not make law, by merely expounding on the unknown, they turn it into law and thus impact on its shape and form. They are therefore equally instrumental in the evolution of the legal framework and its impact on the community.[518]

The Swaziland African Labour Proclamation 45 of 1954 was intended to consolidate and amend the law relating to the recruitment of African workers and their contracts of employment. While para 2 defined 'contract' contextually as service by a manual worker, the Proclamation also provided for labour agents and runners. The Proclamation also defined 'worker' as specifically an African, and by implication excluded natives from the purview of the common-law notions of contract. It constructed a special contract status for natives, subject only to changes by the Resident Commissioner. The following Acts were also included in this regime: the Aliens Act, the Employment of Women and Children Act In, Incitement of Natives To Rebellion Proclamation (1899), the Maintenance of Peace Act

[515] BNB 342 at 66.
[516] BNB 449 at 197.
[517] Swaziland Special Levy Proclamation 7 of 1947. The levy was imposed on all able-bodied males. The policy resulted in the externalization of labour in the mines of South Africa BNB 1121 Government Archive, Gaborone.
[518] Denning 'The Changing Law' (1958) 2 *Journal of African Law* 7. Op. cit.

(1907), the Master and Servants Act (1925), the Native Administration (Consolidation) Acts (1941, 1950), the Native Labour Contracts of Employment Act (1942), the Trade Unions and Trade Disputes Act (1942), the Workmen's Compensation Act (1949), and the Works and Machinery Act (1934).

Through these legislative mechanisms, the HCTs became labour reserves for the sugar plantations and mines in South Africa and Swaziland. This state of affairs produced the first indigenous labour agitation in the form of a strike in the Havelock Asbestos Mine in 1948. The Swaziland Mining Workers Union was established and became operational in 1962, with the next two years witnessing a spate of labour unrests, arrests, trials and imprisonment. In the course of the evolution of labour legislation, the ILO Committee on the Application of Conventions had indicated that out of 102 Conventions, only six were remotely relevant and could be applied with modification in the HCTs. Given this situation, a Trade Unions Act was at best theoretical and academic. What was needed was training for artisans and semi-skilled workers for the future, via the ILO African Field Services office. However, some initial steps had been taken, such as the repeal of penal provisions for breach of contract by minors below the age of 18 years.

The strategy of the colonial government was to impose a dragnet of specific legislation designed to weaken all spheres of native political and economic effort. Superimposed upon this were the ineffectual, all-embracing benchmarks for dependent territories by the ILO, which were neither contested nor actively implemented. The reasons were both regulatory and strategic. This explains why, for example, the Catchpole Report of 1960 glossed over the deprivation and slave labour under which natives were engaged.[519]

8.3 Labour legislation

Swaziland is governed as a sort of modernised traditional monarchy. The King embodies legislative, judicial and executive powers. The legal system is a dualist mixture of unwritten law and custom with enacted laws and administrative agencies created by a partially elected

[519] Annual Report on Application of ILO Conventions S118/2 1958, Government Archives, Gaborone.

Parliament.[520] Since the 1968 Constitution was abolished in 1973, the constitutional source and guarantee of freedom of association also ceased to exist. The King has the power to issue decrees that have the effect of overriding both parliament and the judiciary. The only means of political expression of opinion is via the semi-elected parliament and the *Tinkhundla* system of village-level meetings of a non-partisan nature.[521]The history and political economy of Swaziland shows early settler penetration and a subsequent calculated and carefully planned strategy of land deprivation and surplus extraction. The result has been the almost total reliance on any form of wage labour both internally and externally.

By 1960, capitalist expansion and the externalisation of labour through repressive taxation and the externalisation of male labour power to South Africa resulted in a shortage of labour for the domestic market. Thus the need arose for some form of improvement in labour conditions for inducement and retention purposes. These included marginal increases in wages and the provision of food and transport to workers. Between 1960 and 1980, events had created a situation that called for a different outlook on labour issues. First, the incipient agitation and gradual unionisation of workers in reaction to working conditions and suppression exploded into the strikes of 1963. The state reacted with fear and called for external assistance to quell the strike.

For the state, trade unions became synonymous with a dangerous and virulent foreign ideology. This perceived threat culminated in the abolition of the Constitution in 1973. Unfortunately, this was not enough to contain what had been festering since the expropriation. In addition, the labour situation in the sub-region had been creating its own dynamics and momentum. Given that Swaziland was a satellite economy of South Africa, certain reforms became inevitable as the changes in work and labour philosophy were transported into Swaziland from the South African labour law environment. However, by 1976, Swaziland had ratified 16 ILO conventions, including those on freedom of association (Convention 87) and the right to organise and bargain collectively (Convention 98). In 1980, the first Industrial Relations Act was passed, together with the Employment Act, and immediately resulted in a storm of protest.

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[520] The King and *iNgwenyama* decreed a parliament of not more than 60 elected representatives based on provincial election through the *Tinkundla* system of provincial demarcations, deriving largely from chiefdoms under an executive committee called the *Bucopho,* and 10 representatives nominated by the King.
[521] US Department of State *Swaziland: Country Reports on Human Rights Practices* (2001) at 1.

The protest was a result of the fact that the Act embodied repressive powers that formed an arsenal of restrictions on individual freedoms in the Kingdom. In 1989, the government resolved to seek the assistance of the ILO in the revision of the Industrial Relations Act. A draft statute was submitted by the ILO in 1991 and was promptly rejected by both the Swaziland Federation of Employers and the government.[522] The Wiehahn Commission was appointed in 1992 to enquire into industrial relations in Swaziland, and was assisted by two assessors representing the Federation of Employers and the Swaziland Federation of Trade Unions (SFTU). The report indicated that the Industrial Relations Act was not in itself unacceptable and inadequate, but needed certain amendments to meet ILO standards. The Commission report submitted in November 1993 was not endorsed by the SFTU representative as it did not reflect the core concerns of the unions. These concerns became the 26 demands that subsequently formed the platform for further agitation after they were submitted to the government in October 1993.

In 1994, the government expressed its intention to amend relevant legislation, including the 1980 Act. A draft Bill was tabled in 1995 which, to some extent, addressed some of the 26 concerns. However, the Bill introduced a number of restrictions on trade union rights, particularly the rights of federations to engage in legitimate trade union activities. Prior to the enactment of the Bill, a tripartite forum was convened to provide a protocol on the Bill. This forum produced 65 proposed amendments in its protocol, of which 62 were generally and unanimously approved.

However, the Bill was introduced without the contents of the protocol being included. The Bill was rushed through and assented to on 20 January 1996 in anticipation of a national strike that had been called for 22 January 1996. The new Act prohibited mass abstentions and strikes called by unions while hearings were pending. Therefore, the participants in the strike action became offenders under the new Act. A joint negotiating forum was established in February 1996 to itemise and segregate the concerns of the SFTU into three categories: constitutional, legislative and industrial relations.[523] The legislative aspects of the 26 itemised concerns and the tripartite protocol were submitted to the Labour Advisory Board, which subsequently submitted them to the minister responsible in March 1996.

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[522] See Case No 1884 of *ILO Governing Body Interim Report* at 22.
[523] Ibid.

8.4 Application of labour laws in Swaziland

A new Industrial Relations Act was enacted in 2000. The Act provided for the Industrial Court, the Labour Advisory Board and the Conciliation Board. The Act underwent further amendments in November and was then approved by the ILO's Committee of Experts. It is also important to add that the Employment Act of 1980 was repealed and replaced by the Employment Act of 2001 in order to harmonise employment law and the Industrial Relations Act. The Industrial Relations Act permits employees other than those in essential services to participate in peaceful strikes or protest action to promote their socio-economic interests. The Act also makes an important exception to the generality of strike regulation in Botswana and Lesotho.

The Industrial Court in Botswana adopts an attitude that interprets strike action as an individual decision to absent oneself from work. However, the Industrial Relations Act stipulates that where an employee goes on strike or has been subjected to a lockout, he or she should be re-employed in his or her post, provided that he or she returns two days after the end of the strike.[524] The Act also retains the provisions regarding the Industrial Court and the Labour Advisory Board. Under the Act, unions are free to draw up their own constitutions within the framework laid down regarding the core issues that must be covered. These include the election of officers by secret ballot. Where a union loses its legal status, this may be reinstated once the Commissioner of Labour is satisfied that all legal requirements have been met. The Act stipulates procedures for dispute resolution by defining legal and illegal strikes, and shortens the notice period from 21 to 14 days prior to a protest action.

Though these provisions appear to be the outcome of tripartite discussion, the government seems desirous of testing how far their practical and jurisprudential limitations could be stretched. One of these tests was to see the reaction of workers and the courts to a completely unexpected request.

[524] Section 101.

The Swaziland Government v The Swaziland Federation of Trade Unions and the Swaziland Federation of Labour[525] is a case in point. The government filed an application seeking an order to:

1) declare the protest action called in terms of notices of 2 December 2002 to be unlawful;
2) interdict and restrain the respondents from supporting or participating in the aforesaid action on 23 and 24 January 2003;
3) interdict and restrain the respondents from any conduct in furtherance of the said protest action;
4) interdict and restrain the respondents from calling their affiliates and members to participate or otherwise be involved in the said protest action; and
5) declare that any person or organization or federation that took part in the protest action of 19 and 20 December 2002 and intended to take part in the protest action scheduled for 23 and 24 January 2003 would not enjoy the protection conferred by the Industrial Relations Act.

In their answering affidavit, the respondents raised the following points *in limine*:

1) The applicant was abusing the judicial process as the matter was substantially the same as Case No 347/02, which was dismissed with costs. The matter was therefore *res judicata*.
2) The applicant's attorneys had no legal rights as they were not duly registered in terms of s 30 of the Legal Practitioners' Act 5 of 1954.
3) The grounds for interdiction were not justified as contemplated by s 40 of the Industrial relations Act, which had been fully complied with.
4) He who comes to equity must do so with clean hands, which was not the case here.

In its ruling of 1 January 2003, the court held as follows:

1) The applicant was not in contempt of the court by issuing a statement read by the prime minister. In any case, the respondents had not filed any affidavit nor attested to the contempt so that the court could advise itself.

[525] Case No IC 349/02.

2) The social and economic relevance of the two matters in contention fell within the ambit of s 40 of the Industrial Relations Act. These concerned the conscious assault on the rule of law by the state and the misuse of taxpayers' money to purchase an extravagant jet in these lean times. There was thus no merit in an application for an interdict.
3) The issue of the legal right of attorneys was dismissed as the state's legal representative was the Attorney-General.

The Industrial Relations Act provides for the compulsory resolution of trade disputes by the Labour Advisory Board. Therefore, no protest action is legal until all prescribed avenues have been exhausted and a secret ballot conducted regarding the contemplated action. For this purpose, a strike is understood to mean a complete or partial stoppage of work or slow-down of work carried out in concert by two or more employees, or any other concerted action designed to restrict output and thus to induce the employer to accede to a demand or abandon the modification of the said demand. Strikes are expressly prohibited in 'essential' services, which include the police, security forces, correctional services, fire-fighting bodies, health services and other key civil service sectors.

The Act recognises the right to organise and collectively bargain and prohibits closed shops. An employer may therefore recognise a union in terms of associational and other rights only if it is representative of 50 per cent of its employees, although this appears to be negotiable.[526] Once accorded the recognition, the union acquires the right to conduct its activities during company time and on company premises. What is significant is that although the threshold is far in excess of the usual one-third, the law allows collective agreements flowing from such union and employer interaction to be registered with the Industrial Court according to the requirements. The Act permits workers' councils in enterprises having 25 or more employees, but not representative unions.

The following South African cases are illustrative. In *SACCAWU v The Hub*,[527] the union had claimed organisational rights under the South African Labour Relations Act because it represented 41 per cent of the employees in all the 12 outlets together, and more than 30 per cent of the employees in seven of the 12 outlets. In the other five outlets, it represented less

[526] Section 42 of the IRA.
[527] (1999) 20 *ILJ* 479 (CCMA).

than 30 per cent. The employer had conceded at arbitration that it gave the union rights and access to check-off subscriptions from all outlets. In demanding access to the workplace, the union argued that 'premises and workplace' referred to the company in its totality. The Commissioner concurred that the union was thus the only union and had been given rights by the employer. It therefore qualified as a representative union and 30 per cent was a fair 'representativity' threshold.

In *OCGAWU v Total SA (Pty) Ltd*,[528] the analytical approach was similar, but the Commissioner took a different view when the union attempted to fragment the workplace in order to claim access, stop-order and leave rights. The Commissioner found that when integrated into the 38 centrally co-ordinated depots, the union had only 2.5 per cent representation of the national workforce, and this was too low to render meaningful the right to join a union.

Such progressive changes are occurring and ought to be a very persuasive argument for a change in the intention and interpretation of labour legislation in Swaziland, and perhaps in the other two countries too. The social partners of the government, specifically the SFTU, have been of the opinion that the 26 concerns are still relevant and therefore stand. However, the issue goes beyond the recognition, redress and containment of shop floor issues. What one sees is a claim to a multidimensional role that trade unions such as those in Botswana and Swaziland feel they ought to assume. These would appear to include a social voice and a social policy role, given the socio-economic and political contexts in which they function. The relationship between social protest, the concerted stoppage of work and the employment contract appears inherent, embedded and replays itself at the level of legislation and policy formulation. This is evident in the state's camouflage of its proprietorial interests. This is often conducted through the mechanism of legislation, using political and administrative agencies.

This is amply demonstrated in the case of *Swaziland Government v SFTU and SFL*,[529] which is discussed below. On 18 December 2002 the government brought an urgent application in the night for an order regarding a protest action planned for the next day, 19 December 2002.

[528] (1999) 4 LCD 525 (CCMA).
[529] Case No IC 347/02 of 08 January 2003.

The government sought the following from actions from the court. These are divided into two bundles of issues, A and B:

A

1) To set aside the court rules and deal with the matter as one of urgency.
2) Pending the outcome of the application, *no matter how long it took*, to interdict and restrain the respondents and their affiliates and members from embarking on, promoting, encouraging, supporting or participating in the protest action called for 19 December 2002. (emphasis mine)
3) To re-schedule the said action and notify the members accordingly.
4) That the said application as per the founding affidavit of the Minister for Enterprises and Employment should operate.

B

1) To finalize the order in **A** above.
2) That an order be granted declaring the strike contrary to s 40(10) of the Industrial Relations Act and s 29(1)*(w)* of the Act regarding union constitutions.
3) That the affected unions and their members be rendered liable to prosecution.
4) That a deadline time limit of 9.00 am on 19 December 2002 be set for opposing the application to the court by the Government
5) That service of the answering affidavit be set for 12 noon on 19 December 2002.

The hearing commenced at 9.00 pm on 18 December 2002 with only the designated Court President in attendance. Though s 6(6) read with s 6(7) of the Act required the prior agreement of the parties for the judge to sit alone, the objections were overruled in accordance with rule 9(1)*(e)* of the Industrial Court Rules of 1984 regarding extraordinary circumstances. The respondents also objected to the application as being a matter of urgency as no certificate of urgency was annexed explaining the averment of urgency. The application by the state was dismissed with costs.

In doing so, the court made a very resounding pronouncement that had (and hopefully still has) far-reaching implications for labour law in Swaziland. These are summarised as follows:

1) Regarding the issue of urgency, the court found that precedent from both the High Court and Appeal Court of Swaziland have held that the practice of annexing certificates of urgency is mandatory. This is regardless of the fact

that an Industrial Court, as a court of equity, may dispense with rules of procedure and evidence if this will not result in injustice. It held further

2) That the applicant had rushed to court in the night under extremely inconvenient circumstances, but had nevertheless failed to show cause why it was justifiable to deprive the respondents of the opportunity to reply and state their case in the face of such serious allegations and.
3) that affidavits of the applicant confirmed that it had been given notices via the Labour Advisory Board on 2 December 2002 advising of the intended action in terms of s 40 of the Act. Mediation had actually been attempted, leaving two unresolved issues: the purchase of the jet and the violations of the rule of law and
4) that the prerequisites for lawful protest action, although complicated, are set out in the Act and were met and
5) that the respondents were lawful organizations in terms of the Act and were *bona fide* entities in terms of s 40(5) of the Act and had complied with all the necessary provisions. Further, the court noted
6) that the founding affidavit was riddled with speculation by both the state and the Police Commissioner regarding potential violence arising from the protest action and
7) that the applicant failed to act timeously after the notice to ascertain all the facts and could have given the respondents adequate time to file opposing papers if it had wanted to do so. The respondent had failed to establish the grounds for urgency and a *prima facie* right to the relief sought and finally
8) that the issues of the extravagant purchase of a jet and the state violations of the rule of law fell within the ambit of s 40 as these touched on the very foundations of the Swazi nation and were therefore indeed social and economic in nature.

Given the state of affairs in Swaziland, this was indeed a landmark ruling that seemed to polarise the society even further by forcing the courts to make pronouncements of a socio-political and economic rather than purely jurisprudential nature. The Employment Act, *ex facie* at least, was intended, together with the Industrial Relations Act, to harmonise the law governing employment. The premise was to enact laws that would conform to minimum ILO standards. For this, the new Employment Act repealed the Employment Act of 1980. With

regard to this avowed aim, the employment Act could be described as similar to the Employment Act of Botswana.

However, being more exhaustive than the Botswana law, it defines the employment contract as not just a contract of service but also of apprenticeship and traineeship, whether express or implied, written or oral. It also considers anyone who works for remuneration as an employee. The next issue then is dismissal. This study regards any dismissal as a disciplinary action and thus not voluntary. *McIntyre v Hockin* the court found that the dismissals were both wrongful and unlawful. Before reading out his ruling, the judge quoted a celebrated case as follows:

> [T]he causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstances of the case. Dismissal is an extreme measure and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not have expected to overlook.[530]

Based on the facts of the case, the employer was deemed at fault because no reasons were adduced for the dismissal, no natural justice was afforded the complainants regarding the validity of the grounds perceived as germane. Although notice of three months was given, there were still no reasons given. The employer had to pay damages plus interest of 10 per cent per annum from the judgment date. It appears that employers either do not know the ground rules imposed by the law or are enslaved by the 'prerogative' mind set. Similarly, in the case of *Segolwane v Baletlwa* the dismissal action was found to be both procedurally and substantively unlawful and unfair. Even though the complainant was just a herd boy, there no reasons adduced and no disciplinary inquiry.[531]

Employment must be undertaken as a contract of service or under any other arrangement involving control by or sustained dependence on another person for the provision of work The meaning of 'employer' is expanded to include any agent, representative, foreman or manager of the person entering into a contract of employment with an employee.[532] The place of employment shall be any place at or in which the employee works. The Act applies to all sectors of work except the Royal Swaziland Police Force, the *Umbuto* Swaziland Defence

[530] *McIntyre v Hockin* [1889] Ontario CA per Maclennan JA
[531] *Segolwane v Baletlwa* (1) BLR 3 (IC)
[532] Part I Section 2.

Force and Correctional Services, and no exceptions are permitted. These stipulations are contrary to and incompatible with the ILO Conventions in force in Swaziland. Section 6(3) provides that the Minister may exempt, subject to the publication of a notice in the *Gazette* and the consideration of objectives, any one worker or group or class of workers from the coverage of the Act.

The Commissioner of Labour has sole responsibility for the administration of the Act, which is intended to achieve labour management and sound industrial relations. This study has already commented on this practice of clothing the state bureaucratic and administrative agencies with powers that result in rule-making, interpreting the rules and performing quasi-judicial functions. The Employment Act is important because there is no specific provision excluding membership of unions. What exists is the exclusion of a class of employees and by extension their exclusion from membership of unions. The case of *Swaziland Hotel and Catering Workers Union v Swaziland SPA Holdings Ltd*[533] is important precisely because it illustrates an attempt by the courts to examine statutory provisions that provide blanket authorisation for employers. This is an example of employers arbitrarily manipulating the law to exclude their more informed and articulate employees from union membership in the name of 'management'. It also shows the divergence in relationships where the judiciary consciously supports the arbitrariness of a rule.[534]

On the other hand, as in the case below, the court tried to apply jurisprudential objectivity. In this case, the issue was whether all posts by 'management' were beyond unionisation. Hassanali JA said, quoting Julius Stone in *Social Dimensions of Law and Justice:*

> The modern claim to freedom of association presents itself as essentially a claim of the individual to be permitted to establish relations with others of his own choosing, for the purpose of obtaining for the whole group, some special strength or advantage in the pursuit of a common end.[535]

In this case, the union had negotiated to deadlock with the employer over whether all managerial, supervising and confidential staff should be excluded from union membership. In

[533] Case No IC 1/90.
[534] *Botswana Power Corporation Workers Union (BPCWU) v Botswana Power Corporation (BPC)* Civil Appeal No 42 of 1998 (CA), IC 136/1996.
[535] Stone, *Social Dimensions of Law and Justice* (1966) 386

his ruling, the presiding judge opined that a person in a managerial or supervisory position performs vital roles in carrying out management policy, including disciplinary matters, and is accountable to the management. Were such a person a union member, his or her acts may bring him or her into conflict with fellow union members. It is therefore necessary to draw a line between management and the managed. However, this division has to reflect the realities of each industry.[536]

The honourable judge concluded that exclusions must be justifiable, looking at the job descriptions, the level and scope of supervision, and responsibilities in terms of the implementation of management policy. Thus, those in posts that could be open to union membership cannot have access to confidential, financial and organisational documents, records of employees' financial affairs, recruitment, dismissal, transfer, promotion or powers or recommendation. In effect, formidable and ostensibly powerful posts with no real authority or actual powers and lacking in managerial and supervisory content cannot constitute management positions.

In the light of the foregoing and within the context of the case, the following posts were declared to be outside 'management'. Within that specific context therefore, all the following functionaries can form and join trade unions outside the confines of 'management'-

> unit maintenance manager, assistant estate manager, restaurant manager, assistant convention and banquet manager, assistant accountant, bookkeeper, internal auditor, assistant food and beverages manager, front office manager and executive housekeeper.[537]

This court objectively addressed the rift such statutory provisions could cause, as was the case in Botswana. With reference to offences, s 15(1) of the Act provides that no person shall disclose, publish, communicate or otherwise make use of any information supplied by the employer. How this is interpreted in relation to access to and use of information for bargaining purposes remains to be seen. Section 18 makes the prescribed written particulars and the form mandatory for an agreement to constitute a written contract, and this must be issued no later than 60 days after the date of appointment.

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[536] *Swaziland Hotel and Catering Workers Union v Swaziland SPAR Holdings Case* No. IC 1/90
[537] Ibid

The position of the Commissioner of Labour is firmly woven into the labour law administrative fabric. He or she assumes responsibility for the administration of the Act. He or she has the powers of an inspector. An inspector is anyone appointed as deputy Commissioner of Labour, Assistant Commissioner, Principal Labour Officer, or Factories Inspector, those in similar or lower ranks within the public service, or anyone so designated in writing. He or she receives, investigates, and conciliates any issues arising out of an employer–employee relationship and advises both parties and government as necessary. Inspectors have powers of entry into any workplace and may, with the help of others such as police officers, apprehend, impound materials or detain and issue a compliance order.

In effect, such quasi-judicial administrative functions that are intended to promote effective industrial relations could prove problematic unless and until a proper work ethic is forged within a productive atmosphere. It is only then that a framework can be nurtured to produce positive results. This problem applies in Botswana also. For example, as discussed earlier, some of the cases were dismissed because the Industrial Court lacked jurisdiction and the employee lacked *locus standi*, arising from the Commissioner of Labour not having complied with the strict provisions of s 6 of the Trade Disputes Act of Botswana. The issue of s 7 certificates as a pre-condition for the Industrial Court to hear cases has at times allowed plaintiffs to outwit the Commissioner of Labour in court.[538]

Significantly, the Employment Act provides for the security of employees in the event of the transfer of ongoing businesses or prior to take over. This conforms to ILO Convention 173 which has recently been incorporated into the proposed Employment Amendment Act in Botswana. Sections 33 and 34 of the Swaziland Act deal extensively with the automatically fair and unfair termination of service in a similar way to ss 17 to 26 of the Employment Act of Botswana.

These legislative developments point to the juridification of workers' rights. The colonial era laid the basis for a fractured society. In such a society, law became an instrument of further polarisation and the coercive imposition of artificial stability. This chapter has examined the historical motives behind the reluctance of the traditional elite to democratise, namely, that this might create conditions for the resurrection of the land issue. In essence, therefore, the

[538] *D Magogodi v Grunwald Construction (Pty) Ltd* Case No IC 148/86; see also *James Limbo v Cresta Mowana Safari Lodge* Case No IC 50/96.

evolution of Swaziland labour legislation has also been the evolution of the political economy and its dynamics over the years. Valuable lessons could be learnt.

One lesson is a perceived incremental compliance with ILO benchmarks, together with restrictive domestic legislation in certain spheres. This serves a dual purpose: it keeps international pressure at bay while entrenching disparities that characterise the socio-economic system in Swaziland. In Botswana, the key interpretive problem in some cases has worsened the lack of or confusion about the jurisdiction of the Industrial Court. This has resulted in the absence of the employee's *locus standi* because the Commissioner of Labour opted for a loose interpretation of the strict provisions of s 6 of the Trade Disputes Act.

8.5 Perspectives on labour dispute resolution in Swaziland

The Industrial Relations Amendment Act of 2000 set out to incorporate 'certain international labour practices'. The Act established an Industrial Court, an Industrial Court of Appeal, a Labour Advisory Board, a Tripartite Commission on Conciliation, Mediation and Arbitration (TCCMA), and an Essential Services Commission, in addition to the Office of the Commissioner of Labour and other structures for collective bargaining.

The TCCMA is described as an Alternative Dispute Resolution (ADR) mechanism but is conjoined with the Commissioner of Labour in the execution of its mandate. Thus, trade disputes may be reported to either of them within 6 months of its emergence, and there may be no extension of time beyond 36 months from the inception of the dispute. Both the Commissioner and the TCCMA have extensive discretion in the investigation and referral of cases to the Industrial Court, except that conciliation must be initiated and settlement secured within 21 days (ss 62 to 66). In Swaziland, the latest Industrial Relations Act was incrementally achieved through the persistence of the ILO.

The Industrial Relations Act provides for Joint Negotiation Councils (JNC) and collective agreements, works councils, employee and employer organisations and related issues, freedom of association, the right to organise and strike, and dispute resolution mechanisms.

8.5.1 Arbitration and a code of practice (Industrial Relations Act)

The system of works councils provided for in s 52 confers the power of establishment only on the employer. The modalities for representation on works councils are not set out. Rather, works councils are empowered to negotiate terms and conditions for those who are not members of unions, like the bargaining council of the public sector workers in Botswana. This is inimical to the functions of trade unions and collective bargaining. It is more critical when young unions like the Botswana Public Employees Union (BOPEUP) are being encouraged to ignore workers' federations such as Botswana Federation of Public Service Unions (BOFEPUSU) and to negotiate directly with the state. It remains to be seen whether these provisions and the accompanying anti-union attitude can, have and ever will be permitted to translate into a framework within which freedom of association, expression and assembly in their various forms at the national level can be realised.

Given that the government is synonymous with the state, selective responsiveness, accompanied by the rigid, centralised control of all the levels of power, renders the goal of compliance with ILO standards merely academic. Given that there are reportedly no national minimum wages, that ratified conventions are constantly violated, and that abject working conditions exist, the decorous and superficial labour law superstructure belies the realities of the tensions between the state, the workers and even civil society. The labour law environments of both Botswana and Swaziland demonstrate not only institutional similarities but also functional and methodological commonalities. For example, while Botswana has three distinct Acts relating to labour law, Swaziland has only a comprehensively codified Industrial Relations Act, similar to that of Lesotho and Namibia.

8.5.2 The Industrial Court

Both the Industrial Relations Act of Swaziland and the Trade Disputes Act of Botswana provide for an Industrial Court composed of judges appointed in the same manner as High Court judges are appointed. The functions of the courts are essentially the same in both countries as the courts in both instances are expected to be courts of law and equity. The courts also have independent registrars. The jurisdiction of the court suggests an emphasis on matters arising from trade disputes and matters needing resolution in order to further good industrial relations. Decisions are subject to appeal to the Labour Court of Appeal. While Swaziland provides for an Industrial Court of Appeal Botswana does not. This provision should be replicated in Botswana as it is the trend in the Southern African sub-region

provided it jurisdiction can be clearly stipulated. Its value is that it engenders specialisation away from the over-arching demands on the normal civil justice system. Essentially such courts will regulate their own procedures and proceedings, which also becomes a distinguishing trait.

Considering how the Industrial Court was initially left at the mercy of the established and constitutionally protected judiciary in Lesotho, a similar provision under the Industrial Relations Act needs attention. The Act provides that the Industrial Appeal Court will comprise judges qualified for appointment as Appeal Court judges. Despite that, the Act provides that '[a] decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law.'[539] Granted that the High Court has original jurisdiction over both civil and criminal matters, it would appear that, as in Lesotho, the Labour Appeal Court and the Industrial Appeal Court should be the direct and final forum for labour cases.

The distinguishing features of the Labour Court should guarantee ready and inexpensive access to justice. It is therefore advisable to drop this notion of concurrent jurisdiction with the general courts that impute a questionable seniority and an inherent supervisory authority over the Labour Courts. This is also in spite of the fact that the Industrial Court judges are considered to be similarly qualified and competent. As has been noted, 'the government has overruled or ignored the rulings of the Industrial Court on several occasions. These practices flout the principles of freedom of association, which require that workers have access to an independent court system characterised by an independent judiciary.'[540]

The purpose of the Labour courts is mainly to interpret and oversee the implementation of labour laws so as to ensure good, effective industrial relations. Achieving this will require a rationalisation and harmonisation of the roles of all the other actors who may be both centrally and marginally connected to labour law and relations. The judicial framework, the philosophy and expectations are common to the Industrial Court system which makes them an attractive institution but this instrumentality must be used to enhance social justice. The Industrial Court as the court of first instance should be braced for issues that span the

[539] Section 19(5) of the IRA.
[540] International Bar Association, Human Rights Institute *Swaziland Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law* (2003) 2–3. See *Justice For All: The Struggle For Workers' Rights in Swaziland* American Centre For International Labour Solidarity, Solidarity Centre, Washington (2006).

spectrum of both individual and collective labour relations. This is with recognition of the fact that the Industrial Relations Act has established various structures for dispute resolution. There is the need to acknowledge the role of the Industrial Court system and the fact that the image of the court needs to be enhanced. Otherwise it may be perceived of as either an adjunct of the executive or an appendage of the judiciary.

In the following case the Industrial Court enabled an aggrieved government employee to obtain her entitlements. Mdluli was a teacher who entered into an in-service training bonding agreement in terms of which the employer agreed under the in-service training scheme to cover the costs of her Bachelor of Education studies. Mdluli in turn undertook to return to her job to serve for at least two years. An agreement was signed with the employer. When she entered university, she discovered that the fees had not been paid in terms of the agreement. Upon enquiry, she was told that no such agreement had been concluded, and, if any such agreement did exist, that was an error.[541]

She filed her claim under a certificate of urgency. On a close examination of the relevant papers, it transpired that every page had been signed by the responsible education officer. The court observed that when a person appends his signature to a document, it means he has agreed to be held accountable for the contents. The court therefore ordered that Mdluli be paid the university fees for the period under contract and all payments necessary and incidental to the bonding agreement, including her salary.

In another case, the complainant, Ms Mkhonto, had been dismissed under unclear circumstances. The complainant was applying for an order under a certificate of urgency seeking to be reinstated to her post as the industrial relations manager.[542] Ms Mkhonto had first been employed as an accounts clerk. She was, in recognition of her competence, promoted to the post of accountant and then to the position of industrial relations manager. Subsequently, she was dismissed on the grounds of redundancy. A restructuring exercise had taken place in terms of which some members of the board of directors were also either dismissed or had their positions renewed by the managing director. Ms Mkhonto instituted a complaint in the High Court against the Electricity Board for wrongful dismissal. The Chief

[541] *Martha Buyile v The Swaziland Government and The Attorney General* Case No IC 304/2002 (23 January 2003).
[542] *Zodwa Mkhonto v Swaziland Electricity Board* Case No 343/2002.

Justice reversed the supposed dismissals of the board members affected.[543] The court found the managing director to be unreliable, more so because he had initiated the recruitment of staff for the very positions he then declared redundant. The court ruled in favour of the applicant.

This was not be the first time that a 'dismissal' was effected under the guise of redundancy. It is submitted that dismissal is not the same as the termination of a contract of employment under normal circumstances. In this instance, even if the principle of 'last in, first out' had been applied, an industrial relations manager who rose through the ranks could not be considered redundant. Secondly, retrenchment does not connote dismissal as dismissal carries with it a punitive element.

8.5.3 The Labour Advisory Board

The Labour Code of Lesotho provides for a National Advisory Council of Labour. Both the Industrial Relations Act of Swaziland and the Employment Act of Botswana provide for the same named board. While the duties of the board are now essentially the same, Botswana was, until the May 2004 amendments, rather vague about the composition, meetings, rules and procedures, which are covered in detail in Swaziland Act. The latter Act includes the approximation of ILO Conventions and the preparation of reports and memoranda submitted according to the requirements of arts 19 and 22 of the ILO Constitution among the duties of the board. The board comprises 18 members: six senior government officials and six representatives each of employers and employees or their alternates, with the Commissioner or his deputy as chairperson. This may translate into 12 votes against six, leading to questions of legitimacy if and when worker representatives are outvoted, not forgetting the intimidating potential of this preponderance of state and employer representation.

8.5.4 Tripartite Commission on Conciliation, Mediation and Arbitration (TCCMA)

Though there is a nomenclature variation, these two organs, as they are referred to in Swaziland and Botswana, are charged with alternative dispute resolution prior to the referral of disputes to the Industrial Court. Both are established subject to the consultation of the

[543] Case No 3456/02. HC

Labour Advisory Board, which shall make recommendations, and membership shall consist of those so recommended to the Minister. The Commission in Swaziland receives trade dispute reports directly and is 'standing' rather than 'ad hoc' for this purpose. In Botswana, the Commissioner of Labour receives the reports and determines who is suitable to mediate or arbitrate, as the case may be, from a pool of full-time and part-time appointees. The Commissioner may intervene where he or she apprehends a dispute and may delegate the job of resolution to a panel member. The two Acts provide detailed procedures for effecting alternative dispute resolution which, in their letter and intent, do not differ, and also indicate a preference for compulsory, statutory dispute resolution of disputes.

8.5.5 Joint Negotiation Councils (JNCs)

In Swaziland, a JNC may be formed by an employer, employers' organisations, or one or more registered trade unions, the purpose of which is to negotiate on behalf of employees and employers within an industry where the body considers itself sufficiently representative. Once the requirements for a JNC are satisfied, a notice is gazetted for the purpose of establishing a JNC is published. Where the Commissioner under the Trade Disputes Act of Botswana refuses registration, the only recourse is to the Minister, whereas any aggrieved person under the Swazi JNC may refer the matter to the Industrial Court or to the TCCMA. As the JNC constitutes an important negotiating machinery from which collective agreements emanate and disputes of rights evolve, it is critical for the court to determine objectively the grounds for the non-establishment of a JNC rather than leave it to the political discretion of the Minister.

The provisions of the Industrial Relations Act and the Trade Disputes Act of Botswana regarding dispute procedures, unlawful industrial action and the enforcement of collective labour agreements are not substantially different. Both the content and format are identical and reconcilable.

8.6 Preliminary conclusion

Structures such as an essential services commission in Swaziland and the detailed, crafted roles for mediators and arbitrators are commendable. In Botswana, recent events such as the widening the categories of essential services show that such a strategic organ is not likely to

be created any time soon. The list of essential services in Swaziland and Botswana has, until very recently, been essentially the same by industry or service. In view of the reasons adduced earlier, a body comprising equal numbers of representatives from the government, employers and employees is ideal for overseeing the broad range of issues concerning essential services. The situation in Swaziland is not the result of an absence of regulation.

In fact, as in Botswana and Lesotho, there are examples of juridification. Therefore, workers are overregulated and the work environment is over-administered. The major role player, the state, is also the major cause of disputes. The political will to erect solid structures for open democratic debate is lacking. The freedom given to worker formations regarding socio-economic issues in s 40 of the Industrial Relations Act appears to be an irritant to the coalition of traditional authorities. The Swazi state prefers an incrementalist and cosmetic approach to the ILO minimum floor of rights. Perhaps this is reminiscent of the days when the King Sobhuza rejected the Constitution in 1973 as being too modern for Swaziland.

CHAPTER NINE
Conclusion

9.1 Synthesis and conclusions

This study was structured in segments to underscore the discrete nature of the investigation. The study is an observation of labour law in action in three different countries. It is not a comparative exercise. The segmentation is intended to give prominence to the countries under observation. This structure is explained in chapter 1, which is the introductory part of the study. This is followed by a historical segment. The function of chapter 2 is to lend support and credence to the assertion that industrial disputes can occur only in an industrial environment. Such an environment must provide a context of master–servant or, preferably, an employer–employee relationship.

The argument here is that because these countries were not practising cash economies, the source of the industrial, capitalised organisation of production introduced the disputes through the conscious choice of imposing alien legal systems, cultures and practices on communities hitherto bound by communal norms and practices. Further, these industrial arrangements emanated from an exploitative approach. This approach was often based on dispossession, compulsory labour and other forms of coercive authority without popular legitimisation. Such were the originators and incubators of latent anger and frustration currently encapsulated in the term ‘disputes’.

Colonialism and its agencies were the genesis of disputes within the forms of socialisation effected at work. This is also because colonialist rule was repressive and generated mass dissatisfaction. This could have been deliberate or the result of acts of commission and omission. Essentially, by proceeding from a position of superiority, the colonial rulers sought to transform their subjects. Given that these countries were agrarian and subsistence communities, their transformation was traumatic. Secondly, the re-engineering of social organisation resulted in the dislocation and stratification of the people. The key factors here were taxation and the externalisation of labour providers, who were the able-bodied males.
In chapter 3, the study examined the theoretical and philosophical premises, deductions and tested conclusions that must inform such an academic exercise. This chapter offered an

opportunity of coming to terms with the marriage between theory and practice. This is coupled with the fact that the chapter enabled exposure to ideas and informative debates that made the study enjoyable.

Chapter 4 deals with the state as the dominant player in industrial relations because of its access to judicial and legislative authority. This is coupled with the administrative authority that reposes in its bureaucratic functionaries. As the state is largest employer, it makes sense to acquire all these trappings of power. However, their application must be guided by responsibility and accountability. The other problem is the effects on the ground when such a state is prone to restrictive legislation. In addition to this demonstrated tendency, the state may also exhibit contempt for and suspicion of labour formations. In such cases, the state installs itself not even as the *primus inter pares* but rather the *de facto* superordinate force that protects the *status quo.* In relation to all other social players, it becomes the custodian of institutionalised conduct through its control of the legislative machinery.

Chapter 5 identifies the administrative adjunct of the state as the bureaucratic structures that are created to augment the pervasiveness and the dominance of the state ideologically, economically and also politically. The chapter asserts that this administrative adjunct is a self-seeking group on its own. In this chapter, therefore, some questions need to be answered with regard to the rationale, cost, efficiency and effect of these structures. The other issues are their arrogation of policy formulation and rule-making and their quasi-judicial character. Added to this is the relevance of their presence in the field.

Such relevance can only be determined and tested once the goals and expectations are known and understood. For example, a structure such as the Directorate of Dispute Prevention and Resolution (DDPR) in Lesotho has as its key functions the diversion of disputants from the formal courts by providing mechanisms for alternative dispute resolution and the restricting of forum shopping. Ostensibly, the worker or plaintiff is compelled by law to seek such service for speedy, affordable and effective intervention in disputes. The concern therefore is the fact that the same complainants seek reviews of the DDPR's actions from other forums. The question then is how effective such a structure has been. The chapter thus prepares the contextual environment and the background against which the effects of such a structure can be measured.

The structure of the study enables the countries to be discretely examined against the end goal of dispute resolution. In chapter 6, Botswana is studied. This study examines the internal dynamics and forces at work, and forms the general impression that the most contentious area of labour dispute is the active and interventionist role of the state in its entirety. The state demonstrates an orientation towards the marginalisation of other social players such as labour formations. Therefore, where co-option and accommodation appear inadequate, the state resorts to using legislation to command and regulate industrial relations and the collective strength of organised labour. There is no better testimony than the ongoing amendment of the Trade Disputes Act in Botswana.[544] As clearly indicated, virtually all state employees have been included in the new categorisation of essential services. Strikes by such services are unambiguously prohibited.

Chapter 7 deals with Lesotho. In this chapter, the confusing results of a multiplicity of agencies become clear. First, the labour court system had to go through a baptism of fire in its formative years as the formal courts sought to reduce it to an administrative tribunal.[545] Then came the establishment of the many structures created to achieve the same objective. The dominant impression is a jurisdictional turf war, due largely to an imprecise allocation of functions. In effect, aggrieved and complaining workers led by their ill-informed representatives suffer largely from an inability to understand the idea of a forum of first instance. This is now compounded by confusion and the misinterpretation of enacted ground rules. It was equally portentous when the prime minister widened the list of essential services to include banking in 1982. This action was undertaken with retrospective effect from 1975, the year of enactment of the Essential Services Arbitration Act.[546]

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[544] Trade Disputes Bill 12 of 2015 (published in the *Government Gazette* on 22 June 2015). In Part VII, a new list of essential services is enacted in s 46(1): Air Traffic Control Services, Botswana Vaccine Laboratory Services, Bank of Botswana, Diamond Sorting, Cutting and Selling Services, Electricity Services, Fire Services, Health Services, Operational and Maintenance Services of the Railways, Sewerage Services, Water Services, Veterinary Services in the Public Service Teaching Services, Government Broadcasting Services, Immigration and Custom Services and services necessary for the operation of any of the foregoing services. In s 46(2), the Minister, after consultation with the Board, by Statutory Instrument published in the Gazette declare any service not referred to in s 46(1) essential in the event the interruption of the service which, as a result of the duration of strike, endangers life, safety or health of the whole or part of the population. Section 47 proceeds to seal the fate of workers in those services by providing that 'no employee in essential services shall take part in a strike and no employer in essential services shall take part in a lockout'.

[545] See *Motaung v National University of Lesotho and Others* Case No. CIV/APN/182/06; see also *Lerotholi Polytechnic and Another v Lisene* Case No. LAC CIV/O5/2009 and *Minister of Labour and Employment and Others v Ts'euoa Case* No. (CIV) 1/2008. (CA)

[546] *Lesotho Union of Bank Employees (LUBE) v Barclays Bank Plc and Another* Case No. CIV/APN/357/1994 (11 June 2003).

The implications for labour relations and public administration are still being felt today.[547] From 1990, the numbers of miners in South Africa overall, and from Lesotho in particular, have fallen fairly rapidly. Total employment in South African mining reached a low in 2001 at 406,000, before recovering a little. Now that the mines prefer South African workers, who can be more easily 'stabilised', migrants from Lesotho have been retrenched, so that by late 2010 the number of mineworkers from Lesotho was estimated to be fewer than 43,000.[548] This suggests that internalised values and survival habits in industrial relations and labour law in South Africa will be trans-located in Lesotho. The consequences for Lesotho of the end of legal migration to work in the South African mines and the retrenchment of migrant workers have been devastating. The attendant socio-economic difficulties have been exacerbated by population growth, political instability, drought, continuing soil erosion, and the peculiarities of the country's limited economic development.[549] Now, the political violence and instability are bound to directly affect production relations.

In chapter 8, Swaziland was examined. Swaziland is a victim of both external greed and its own affection for traditional norms and customary law. The land question underpins property ownership. The subsequent character of labour relations is determined by an environment based on engineered dispossession and dependence. This has forced worker formations to shift attention to socio-economic issues. The modalities for this may include strikes because the unions are denied by law a platform for open social interaction. However, given the current realities on the ground, industrial citizenship cannot co-exist with absolute monarchism clothed as neo-liberalism, where land is vested in the King and *iNgwenyama*.

The best indicator is the latest edict from the King: 'From yesterday, Swaziland no longer has any existing employer and employee federation after government stopped their operations with immediate effect.'[550] According to the *Observer*, this effectively means that the Trade Union Congress of Swaziland, the Federation of the Swaziland Business Community, and the Federation of Swaziland Employers and Chamber of Commerce no longer exist. The minister went on to state that the decision also meant that the federations' membership of statutory boards was being 'terminated forthwith' and that 'their representation in other statutory

[547] Cobbe 'Lesotho: From Labor Reserve to Depopulating Periphery?' *Migration Research Initiatives* 2 May 2012.
[548] Ibid.
[549] Ibid.
[550] *Swazi Observer* Monday, 20 July 2015.

organs will also come to an end.'[551] The minister was referring to the Conciliation, Mediation and Arbitration Commission, the Swaziland National Provident Fund, the Training and Localisation Committee, the National Social Dialogue Committee and the Labour Advisory Board.[552]

9.2 Perspectives of the study

In the following sections, some particular and general comments are made prior to the conclusion.

9.2.1 The historical linkages and commonalities

In terms of the position earlier adopted in the study, Botswana, Lesotho and Swaziland have common legal antecedents. Incidentally, some traditional aristocratic tendencies have survived the era of overt traditional royalty. These are now clothed with a semblance of transformation and modernization. These pseudo - liberal political systems are tolerated only as a veneer and superstructure superimposed on embedded traditional belief and value systems. Compliance with edicts, now referred to as the law, has become the norm.

In terms of path-dependence, there is a historical similarity between the three countries. From Tshekedi Khama to post-colonial Seretse Khama to Ian Khama, the common thread is royalty and its internalised value systems kept intact after colonialism. The systemic regimes of order, command and control relate to the era of orders and command of the colonial master. The same applies to the era of Chief Moshoeshoe to present-day King Letsie. In Swaziland, the dynastic nexus exists from King Sobhuza to King Mswati. This chain of dynastic political and socio-economic power has coalesced into an elitist expectation of full, docile compliance with regard to all forms of state authority. Sanctions were applied if people defaulted. Such a perception has defined current social relationships.

The elitist reward system has survived and helps to define the nexus between the owners and the creators of that which is owned the servants. The relationship between servant and master is still defined in terms of the power holders and the objects of power. This relationship

[551] Ibid.
[552] Ibid.

informs the regulatory framework of labour legislation. As a result, social structures are created and institutionalised with patterns of pre-determined conduct that are erroneously perceived as contributions to social stability. The reality is actually strategic and instrumental compliance, which translates into legislating stability not legitimisation of legal rules. Such compliance is rewarded by the state through prescribed entitlements and economic benefits.

9.2.2 The state and industrial relations

In other words, culture and tradition have become fused with modern forms of the exercise of political authority without corresponding governance or reflexive rule-making. Transposed on modern social organisation, the coalition of the modern state and tradition enable the state as employer to preside over societies differentiated into the economically dependent and the owners of capital, property and access to resources. This is why the employee is considered inferior, subject to command and control. Therefore, concepts such as collective bargaining and strikes are irritants. In particular, the boldness of the servant or employee to demand better returns on the application of his or labour power is considered as insubordination and a challenge to the master's or employer's *status quo.*

This perception of insubordination or disrespect explains the reluctance of the state to allow a complete re-conceptualisation of sovereignty. This subjective concept of local sovereignty is used to justify the denial of basic rights at work and the strict regulation of the internal labour market. Learning from history, the elite are suspicious, imagining a grand conspiracy by entities such as the ILO to substitute autocratic, undiluted power with social plurality, both inside and outside the workplace. The inevitable consequence is apparent and latent disputes which are generally transformed into collective grievances. To discourage such anti-establishment conduct, individual labour law is used to specifically prohibit the group display of dissatisfaction. On this assumption also, the inadequacies of the state are projected onto unions as manipulators of collective disputes. In the context of employment relations, the strike then becomes the focal point of state intervention.

It must be remembered that the individual cannot represent the conditions of the many. Therefore, disputes become a focus of undue attention because it is assumed that, invariably, trade unions acquire a collective and synergic force that can destabilise the structured

arrangements of society. In sum, both consciously and unconsciously, the state causes workplace disputes and, through its intransigence, triggers strikes.

9.2.2.1 Botswana

In Botswana, collective bargaining is allowed, provided that the union represents at least one-third[553] of the workforce. The minimum percentage of representation that enables collective bargaining is possible only in the public services, the mining and diamond sorting sectors, and, to a lesser extent, in the railway and banking sectors. The Trade Disputes Act vests authority in the Commissioner of Labour to ensure that employee unions follow the prescribed procedures, including compulsory arbitration. In recent years the government has used legislation to order strikers back to work, while private employers are reported to ridicule the unions and be hostile towards them, perhaps because they are assured of the state's desire to neutralise labour formations.

For a strike to be lawful, it must first deal with interest disputes and must then conform to the provisions in ss 40 to 42 of the Act. The procedures and conditions prescribed must be complied with. Since these processes are cumbersome and clumsy, strikes are ultimately declared illegal in virtually all cases. Striking workers are therefore at risk of dismissal, among other penalties. In 2004, Debswana (diamond mine) workers had to go to court for the settlement of their grievances. Similarly, 181 workers at the Bamangwato Concessions Ltd company (BCL) had to seek redress before the courts in 2006. In the latter case management preferred another union to the main trade union. It is alleged that, as a result, the workers went on an unprotected strike. This gave management the grounds for 'massive' dismissals.[554]

In general, some employers are equally uninformed about the intricacies of the laws. Paradoxically, they then turn around to take advantage of this very absence of clear legislative provisions. In addition to dismissals, there have been other anti-union practices, including harassment and spying. There have also been threats and a refusal by employers to

[553] Section 48 of Part XI of the Trade Unions and Employers Organizations Act [Cap 48:01]. See s 32 of the Trade Disputes Act [Cap 48:02]: Recognition at the workplace.
[554] This is an updated version of extracts from the 2009 report for the World Trade Organization (WTO) Council review of trade policies of the five countries of the Southern African Customs Union (SACU).

pay union officials their salaries because they have been deployed to union headquarters to undertake officially permitted union activities.

The registrar of unions has the power to de-register a union or to refuse to register a union if he or she deems its name or objects as being too similar to those already registered. However, an unwelcome development is the multiplicity of legal unions, which has resulted in the fragmentation of worker formations as each segment of public sector workers scrambles for registration and recognition. An equally worrying consequence is the feuding within the unions themselves and between the labour federations in both the public and private sectors, instead of these federations creating a confederation. It is submitted that this laxity is a strategic move by the state which wants the unions to dissipate their energies.

9.2.2.2 Lesotho

The exercise of collective bargaining meets particular difficulties in the education sector. For example, it has been alleged that the Lesotho Teachers' Trade Union's long-standing disputes have been left pending for as long as ten years in the High Court. Additionally, the Ministry of Labour prevented the teachers union from taking part in the work of the Commission in charge of setting wages, although the Commission is supposed to be a tripartite body.[555] Unions accuse the police of denying workers permission to celebrate May Day by holding a parade. The explanation is usually that such celebrations coincide with local government elections.

The right to strike is recognised and such organised action, mostly in the private sector, can occur only after satisfying the complex procedures required to officially declare a strike. In practice, there have not been any lawful strikes in the country for many years. The few spontaneous protest actions have been technically defined as illegal, thus posing the threat of the dismissal of any worker who takes part**.**

The law prohibits anti-union discrimination; however, many employers deny union organisers access to industrial premises to recruit, discuss, organise or represent workers in disputes. Threats of dismissal are common, particularly in domestic industries, while the

[555] Ibid.

textile and apparel sector unions have reported that their members are treated unfairly in order to compel them to leave. In Lesotho civil servants are prohibited from joining trade unions. Furthermore, they may not participate in politics, speak in public, identify with any party, canvass, display or wear symbols, rosettes, chant or sing at any rally, or perform 'any other act or conduct whatsoever of a public officer of which the public may reasonably be induced to associate or identify the officer with an organization or movement of a political character'.[556]

As noted earlier, in Botswana, Lesotho and Swaziland, legal strikes are virtually impossible. According to reports, there have been repeated violations of labour rights by enterprises in export processing zones. These violations of trade union rights impede trade union activities and deprive millions of workers of a tool to achieve a fairer distribution of income and an escape from poverty.[557]

In Lesotho, workers have the right to form and join trade unions, except for civil servants and the police. However, although the Lesotho Constitution guarantees freedom of association, public employees are prohibited from forming and joining trade unions. They can form or join 'associations' instead, whose role is limited to providing their opinion. The law allows unions to conduct their activities without interference. The Ministry reported that 40 unions were deregistered during 2006 and 2007 for failing to submit annual reports. The rights to freedom of assembly are generally respected, with some exceptions, such as the June 2007 curfew, which lasted a week and featured military deployments and roadblocks in the capital, Maseru.[558] Collective bargaining is recognised only for trade unions that meet the threshold of 50 per cent.[559]

9.2.2.3 Swaziland

A state of emergency introduced in 1973 suspended all constitutional freedoms until a Constitution was enacted in 2006, but this merely entrenched the political *status quo* in force since 1973. This vested executive, legislative and judicial powers in the King, while banning opposition parties and meetings. The new Constitution's vague clause on 'breaching state

[556] Section 144 of the Public Service Regulations 2008 as pursuant to s 29 of the Public Service Act 1 of 2007.
[557] Report on SACU Countries op cit.
[558] Ibid.
[559] Section 198A (1) of the Labour Code Order: Duty to Bargain in Good Faith.

security' can be interpreted broadly and subjectively. This is not to say it is unique to Swaziland. In Botswana and Lesotho, apart from constitutional provisions, individual legislation has been enacted to serve this same end and could be extended to cover other subjectively defined matters.[560]

The Constitution and the law provide for the right to form and join trade unions. However, the requirements are tedious and exacting, as in Botswana and Lesotho. In order to be recognised, a trade union must represent at least 50 per cent of workers in the workplace, which is a high percentage. Otherwise, recognition is dependent on the employer's goodwill. The new Constitution gave the employees in essential services the freedom to form unions, but they have no right to strike.[561] Essential services include the fire brigade, the police and security forces, the health care sector and many civil service positions. The authorities may continue to refuse recognition to the Swaziland Police Association and the Swaziland Correctional Service Union.

However, provision is made in s 27 for such associations to apply to the employer for recognition as a representative association. Additionally, union activity may not be effectively protected against employers' interference. This could be because the unions find it difficult to satisfy the deliberately problematic requirements. The law may make provision for the protection of employees, as in the Employment Act. However, the state is still the worst offender when it comes to concretising an internationally accepted fundamental floor of minimum rights, even if the laws protecting unions from governmental interference are cast in stone.

It has been reported that employers' interference with workers' councils has contributed to the inability of some trade unions to negotiate collective agreements. Furthermore, there are reports that some employers dictate which decisions are taken in the workers' councils. The law prohibits anti-union discrimination; however, private companies, especially foreign companies of the garment sector, continued to discriminate against unionists. Although the law provides for reinstatement and for fines against employers in the event of unfair

[560] Public Order Act [Cap 22:02], Public Safety Act [Cap 22:03], National Security Act [Cap 23:01], among others.
[561] See ss 91 to 96 for comprehensive coverage.

dismissal, no such accusations were officially made.[562] The Industrial Relations Act provides for strikes and lockouts during protected strikes. Section 40 deals with peaceful protest over socio-economic interests once the requirements are met. What is not clear is whether strikes are peaceful protests.

If so, any protest that is peaceful should be lawful. In any case, union grievances are generally over economic or bread and butter issues. The procedures for voting for and announcing a strike may be complicated and may take a long time, but this is intended to accommodate a 'cooling off' period. Therefore lawful strikes are virtually impossible in Swaziland, Botswana and Lesotho. It is alleged that the trade union leadership faces torture, including virtual drowning, to obtain information. In previous years union leaders were ordered to surrender their travel documents after attending meetings abroad.[563]

It has been reported several times that the police and the Conciliation, Mediation and Arbitration Commission use employers, especially the management of foreign garment firms, to resist workers' demands and thus sustain the inhumane conditions of work and low wages.[564] The government has repeatedly failed to fulfil its promise to improve labour legislation based on the very many recommendations that the CEACR has made. The problem is the defectiveness in the philosophy and approach of the ILO. It espouses norms and morals, but lacks any coercive authority and expects states with entrenched socio-economic and political interests to buckle under logic and persuasion.

Although the core ILO Conventions in these areas have been ratified by Swaziland, there are serious violations of freedom of association and the right to collective bargaining in Swaziland and Lesotho. The state intrudes into unions' activities by preferring to negotiate with certain unions over others. In Swaziland, violations are so serious and widespread that they certainly have a negative impact on wages and working conditions in every sector, including the export sector. As reported,

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[562] Ibid.
[563] Part of the updated version of extracts from the 2009 report for the World Trade Organization (WTO) Council review of trade policies of the five countries of the Southern African Customs Union (SACU).
[564] Ibid

> 'In Lesotho and, to a lesser extent, Namibia, the correlation between violations of workers' rights and the existence of export processing zones (EPZs) demonstrates a clearly negative influence of international trade and investment on workers' rights.'[565]

It is therefore not the institutional structures created that are at fault but the perceived philosophy of the political state, shored up by the interest-driven bureaucratic elite.

9.2.3 The institutional architecture

The administrative and quasi-judicial capabilities of these structures have been addressed in this study. Their functions have been rigorously outlined and discussed. They will be identified again in this section, but as a collective machinery or framework. Included here are the most important structures in terms of current trends and reality: the Department of Labour, the Commissioner of Labour, the Industrial Court, the Labour Court, the Labour Appeal Court, the Industrial Court of Appeal, the Labour Advisory Board, the Minimum Wages Advisory Board, the Conciliation, Mediation and Arbitration Commission, the Panel of Mediators and Arbitrators, the Director of Dispute Prevention and Resolution, the National Advisory Committee on Labour, and the Industrial Relations Council.

9.2.4 Bureaucratic and administrative overkill

This section presents points of observation and implied challenges.

1. The most obvious issue is the sheer number of structures. This is remarkable because, if problems can be solved by the number of resources allocated to them, then Botswana, Lesotho and Swaziland should not be experiencing an almost cyclical revolution of disputes.
2. There is a preponderance of human capital as opposed to other resources. However, the ground realities show that the majority of functionaries are either poorly trained or not trained at all. Given the government's method of recruitment, most functionaries are generalist in outlook, and are expected to learn the ropes on the jobs that they are assigned to do.

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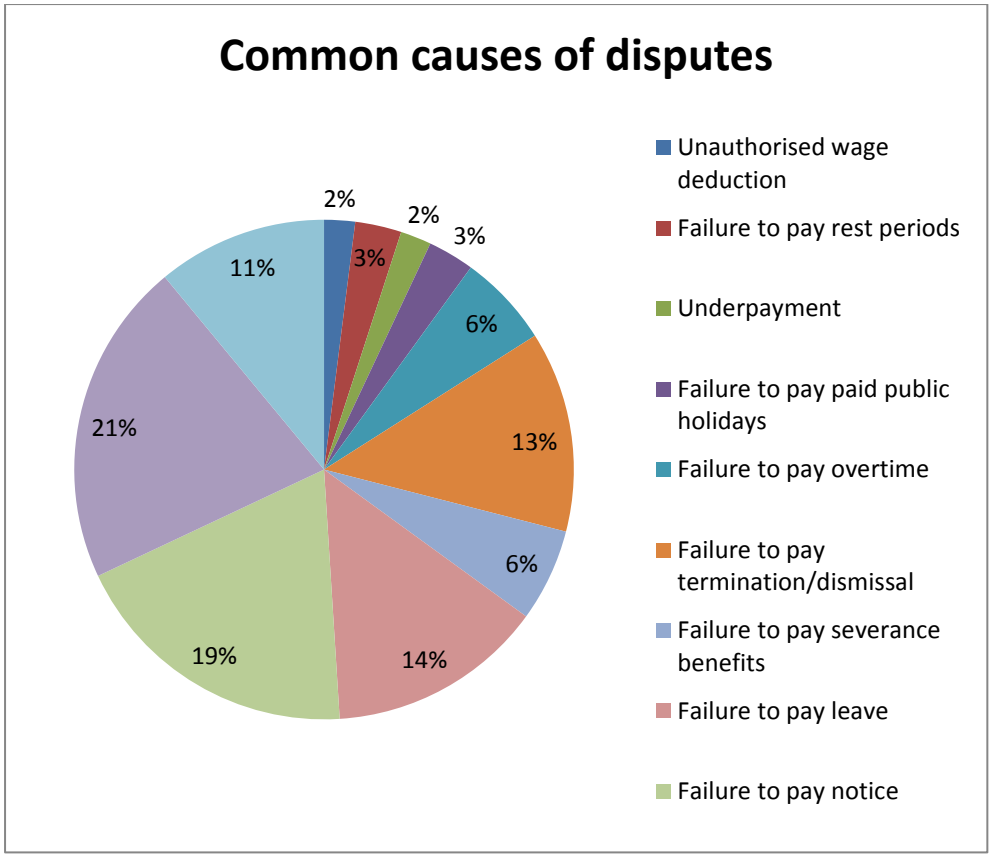
[565] Ibid

3. Labour issues are dynamic and reflect macro-level realities, such as a living wage, the cost of living, salary disparities, occupational health and safety, social security, industrial psychology, attrition, retrenchment and retention. These cannot be tackled by just any employee, whether classified as a labour officer or not.
4. One perspective is that purporting to make rules that touch on constitutional and fundamental human rights can only lead to juridification, not comprehension, applicability and relevance.
5. The spectrum of issues that arise in the workplace show that the workplace is a microcosm of the wider society.
6. An important issue is the orientation and attitudes of those attempting to intervene in labour disputes. Most functionaries forget that they are employees and not employers. Because of their varied backgrounds, they cannot have been trained in the details of labour law and employment relations.
7. In simple terms, therefore, those charged with preventing and resolving disputes easily turn out to be the causes of disputes and the delay in their resolution, and are agents of confusion as to substantive issues pertinent to their brief.
8. The state creates a multiplicity of structures in reaction to episodes in the employment relationship. It does not engage in long-term tripartite consultation as to policy direction which a law might then be enacted to support.
9. The institutionalised directions prescribed by the state to field officers should not create space for discretion because the performers lack the capacity and integrity to wield discretionary authority.
10. On the basis of the facts, the observation above applies across the wide range of these bureaucratic and administrative adjuncts, to ministers, labour court judges, directors and commissioners. For example, the question of whether a labour court is a court or an administrative tribunal should never have been allowed to arise. The creation of specific levels at which types of dispute may be resolved may have checked forum shopping, but cases still end up in the appeal court, suggesting that forcing the parties to go through conciliation and mediation before compulsory arbitration does not generate any more trust than the system conveys or portrays. Alternative dispute resolution should satisfy parties as an alternative step, not a preliminary step. Case management has not solved any problems either.

11. The Commissioners of Labour are overloaded with both administrative and judicial authority, without any proper grounding in the substance of hard law, the normative basis of soft law, and the actual objectives of their authority.
12. The tendency to meet every challenge with new legislation and new structures is not only counter-productive, but also results in jockeying for more staff, more resources and more attention, budgetary considerations, the creation of bases for parochial power and a reward system.
13. Essentially the tragedy is the inability of labour law to provide a framework for the practical deliberative resolution of disputes, because of the untenable assumption of a free market for transacting business between two equals: the potential buyer of labour power and the seller of labour power.
14. In all these matters, the political state prefers to maintain the *status quo* rather than meet the challenges of governance and accountable leadership.
15. Issues such as the imposition of wage ceilings and the arbitrary determination of essential services that underpin employment relations become pawns in the political game. Such a game is played according to the whims of the state, particularly *de facto* one-party states.

9.2.5 Employer and employee relations

At this point, an illustration from Botswana should suffice as an indicator of the scope of the problems created by workplace interruptions.



Botswana Department of Labour and Social Security *Annual Labour Report* (2011) 7.

It is reported that a total of 11,971 trade disputes were reported at District Labour Offices nation-wide during 2011. 940 cases were pending as at December 2010, and these were carried over to 2011. The total caseload for the reporting period was therefore 12,911.
With regard to reported, settled and pending disputes, from 2003 to 2005 there was a decline in the number of reported disputes, while from 2006 to 2010 reported disputes increased. There was a significant decline in 2011, the year in which the latest and largest strike by public sector workers occurred.

9.2.6 Recommendations and the challenges ahead

This study regards recommendations as methods that can be used to achieve more effective ways of dispute prevention and resolution. In the previous section, this study did not apportion blame as this was not the aim of the exercise. That said, the key objective was to determine why labour disputes appear to have developed a resistance to the several approaches being adopted. The issue that needs attention is the modalities and mechanisms

for the resolution of disputes. It is doubtful that even if several procedures and stages are put in place, disputes will abate or subside.

This study suggested that addressing the symptoms instead of the root causes cannot cure an ailment. Disputes are responses, reactions and manifestations. The causes may be historical or contemporary but man-made. This is because disputes started with man as a gregarious, social and greedy animal. Therefore, the problem lies with humanity at various levels of social organisation. The conceptualisation, transformation and creation of the interventionist mechanisms that have been dealt with in the study suggest that these interventions might even contribute to the exacerbation of disputes. This is the source of a lack of faith in the efficacy of a treatment. Therefore, this study makes the following proposals:

Education and acculturation

All who are concerned with labour issues, including the key actors in employment relations, need a different orientation to such relations. The workplace is not a theatre of war. Ideally, the state should stop thinking like an employer under siege. It should lead and initiate a new orientation. Such an orientation is needed to visualise the work environment as a place that is conducive to constructive participation in generating the resources for collective growth and the development of a society.

Deconstruction and reconstruction

Unions and employer associations should come to terms with two facts. The first is that disputes are inherent to any socialisation process. Secondly, employees should not have to use their leave days before engaging in genuine and lawful activities. There is a need to deconstruct the employment relationship so as to eliminate the over-emphasised distinction of the prerogative of the master–employer and the notion that the employer commands and the employee must obey. A new ethos must be constructed and nurtured where workers are respected and accorded recognition for their indispensable contributions and are also regarded as equal to the employer in terms of dignity.

De-politicisation of the workplace and work relations

Workers and employers should be free to engage amicably in the internal politics of the workplace. The ideological and political preoccupation of partisan politics should be prevented from defining work relations, economic concerns and the organisation of

production. Employers and employees should be free to regulate their own internal processes and relations, together with their terms and conditions of service. This should complement the house-keeping that is internally driven. The state should refrain from its persistent intrusion and interference as some of these interventions have turned out to be extremely damaging.

Training and skills acquisition

For the worker and those claiming management status, requisite skills acquisition should be a life-long activity to ensure proper socialisation, and ultimate marketability and versatility in the labour market. Such transformation of value can minimise the perception of exploitation.

Collaborative and deliberative policy formulation

Assuming that the insecure state insists it has the right to dictate labour policy, it should accommodate the other social partners in a collaborative derivation of policy. Such a step results in collective ownership and legitimisation. The state's penchant for leadership and dominance alienates the workplace actors. The state might assume juridical authority but knows very little about the dynamics and realities of work and the economics of production. This, it is submitted, is one of the critical challenges for employment relations.

Rationalisation of juridification and discretionary authority

- The plethora of rules and regulations results in juridification. The present state of economic production in these countries does not need neo-liberal deregulation. The issue is not deregulation from a globalization point of view. That is economic strangulation.
- The multiplicity of agencies making often contradictory rules and offering problematic interpretations should be rationalized.
- Currently, there is excessive rule-making, superfluous institutionalization, and consequent over-administration.
- Delegated authority must be accompanied by oversight and accountability. For example, a minister should not be able to amend a statute simply by asking the government printer to gazette such change.

- The clandestine enactment of laws at political party leadership caucuses, including the determination of salaries, should be discouraged. There are constitutionally created bodies responsible for such activities.

Democratic social dialogue

Industrial citizenship should be the goal of any entity that claims the right to dictate how all aspects of social interaction should be policed. For the workplace to transform into an environment that is conducive to dialogue, a minimum floor of rights should be mandatory. Social dialogue should be promoted. At the shop floor level, dialogue should be an integral part of the terms and conditions of service. In an ideal situation there will be a formal recognition of 'representativity'.

A new trajectory and role for domestic labour law

Finally, labour law must be re-cast. While it would be preferable to craft a home-grown framework, current structural and ideological changes are headed towards forms of regional and sub-regional integration. It is therefore preferable to open the domestic labour law environment to the total influence of international labour standards via the ILO.

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